

JUSTIFYING DIRECT DISCRIMINATION
AN ANALYSIS OF THE SCOPE FOR A GENERAL JUSTIFICATION
DEFENCE IN CASES OF DIRECT SEX DISCRIMINATION

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Abstract of thesis

The prospect of a justification defence in cases of direct sex discrimination is universally criticised by academic commentators on the ground that it would subvert the goal of equality that underlies sex discrimination and equal treatment legislation. At the outset the thesis examines the differences between the sexes, how these differences can be used to explain the distinction between direct and indirect sex discrimination and considers various concepts of equality. Building on various elements of the existing justification defences for indirect sex discrimination and disability discrimination, this thesis constructs a model justification defence. The impact on equality of such a defence is assessed by reference to the main existing legislative exceptions for direct sex discrimination and various judicial exceptions that have been created, in the main, by the European Court of Justice. Further, the thesis considers whether the blanket prohibition against the use of sex stereotypes is warranted and the extent to which they might be permitted under the model defence. The conclusions reached are that criticism of the potential defence is overstated. Rather than undermining the goal of sex equality, such a defence could in fact enhance the degree of legal protection as long as the criteria of the defence are stringently drawn. Indeed, in relation to some areas of direct sex discrimination, for example pregnancy and maternity, the introduction of such a defence could enhance the degree of equality. Moreover, the introduction of such a defence could introduce a greater degree of openness and clarity into this complex area of law.

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Abbreviations

BPD	Council Directive 97/80/EEC on the burden of proof in cases of discrimination based on sex
CA	Court of Appeal, England and Wales
CRE	Commission for Racial Equality
CS	Court of Session, Scotland
DDA	Disability Discrimination Act 1995
EAT	Employment Appeal Tribunal
ECJ	European Court of Justice
EOC	Equal Opportunities Commission
EPA	Equal Pay Act 1970
EPD	Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women
ERA	Employment Rights Act 1996
ETD	Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions
HC	High Court, England and Wales
HL	Appellate Committee of the House of Lords
NICA	Northern Ireland Court of Appeal
OSSD	Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes
PA	Pensions Act 1995
PLD	Council Directive 96/34/EC on the framework agreement on parental leave
PWD	Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding
RRA	Race Relations Act 1976
SDA	Sex Discrimination Act 1975

INTRODUCTION

BACKGROUND

All domestic and European sex discrimination legislation recognises two forms of discrimination, namely direct and indirect discrimination. Broadly speaking, direct discrimination involves detrimental treatment on the grounds of sex. Indirect discrimination arises where an employer arranges the working environment in such a way that it has a detrimental and disproportionate impact on one sex and the employer is unable to justify the practice. Thus, indirect sex discrimination is subject to what is often referred to as the justification defence. One of the issues that has engaged sex discrimination lawyers over recent years is the prospect of a justification defence for cases of direct sex discrimination. The main forum for debate has been European law where the tendency to draft legislation in terms of general principles allows for a considerable degree of judicial inventiveness although the issue has also arisen in domestic law in the context of the EPA.

The first case to raise the possibility of a justification defence for direct sex discrimination was *Birds Eye Walls Ltd v Roberts*.¹ The case involved a bridging pension paid to employees forced to retire early by reason of ill health. Until the age of 60 there was no material difference between the treatment of women and men. From the age of 60 the occupational pension payable to a woman was reduced by the amount of the state pension. A similar reduction was applied to men from the age of 65 when they too became entitled to a state pension. Thus, the overall amount paid to women and men (occupational and state pension combined) was the same but, in terms of the occupational scheme alone, between the ages of 60 and 64 women received less than men. On behalf of the applicant it was argued that the treatment constituted direct discrimination on the ground of sex and, therefore, no justification was possible. According to the report of the proceedings the European Commission argued in favour of a justification defence.

The Commission of the European Communities accepted that the present case was one of direct discrimination, but argued that this did not imply that it could

¹ [1994] IRLR 29, ECJ.

not in any way be justified. It is inherent in the concept of discrimination that a distinction is unlawful only if it is unjustified. Thus, it is lawful to treat different situations differently, so long as the difference on which one focuses is directly relevant to the ensuing difference in treatment. That must logically be true just as much for direct differentiations between the sexes as for indirect distinctions.

In the present case the Commission was of the opinion that there was justification. It pointed to the fact that Birds Eye Walls was attempting to achieve substantive equality between the sexes by compensating for an inequality (difference in pensionable ages) in a particular set of circumstances where the inequality would otherwise cause considerable hardship, that is to say, in the situation of a male employee obliged to retire early because of the state of his health and (unlike his female counterpart) not qualifying for a state pension until he reaches the age of 65.

Thus, the Commission argued in favour of a justification defence for cases of direct sex discrimination as long as the difference in treatment is directly relevant to a difference between the sexes. In this particular case, the Commission thought that the difference in treatment could be defended on the basis of the difference in state pensionable age and the aim of the respondent to achieve substantive equality.

Advocate General Van Gerven also came down in favour of a justification defence. He argued that it would be undesirable to rule out completely the possibility of a justification case for direct discrimination on the basis that there might be exceptional cases where the need might arise. He referred in particular to the facts of the *Webb* case (see below) that was pending before the Court and the possibility that the treatment in the case might be justified.²

The ECJ managed to side-step the issue of justification completely by finding that between the ages of 60 and 64 women and men are not in a comparable position and, as a result, there was no discrimination either direct or indirect. Save for repeating the submissions of the Commission and the various other interested parties, the ECJ made no comment whatsoever on the issue of a justification defence.

² His other argument in favour of such a defence was based on the premise that the treatment in the case could be analysed as either direct or indirect discrimination and, therefore, it would be quite arbitrary to make the question of justification depend on the way in which the discrimination was classified. The idea that the discrimination could be categorised as indirect came from the Commission which suggested that the problem could be analysed from the perspective that the respondent treated all its members in the same way ie by deducting from their occupational scheme their entitlement to a state pension. However, this loses sight of the fact that the payment of the state scheme is itself directly discriminatory and, therefore, on the application of the but for test proposed by the HL in *James v Eastleigh Borough Council* [1990] IRLR 288, the occupational scheme can only be categorised as direct discrimination.

The issue came up again in the case of *Neath v Hugh Steeper Ltd.*³ This was another pensions case, this time concerning the use of single sex actuarial factors and their effect on capital sums such as transfer payments. The applicant complained that the use of single sex actuarial factors meant that he received a smaller transfer payment than a woman with the same service and contributions record. The Commission argued that differences in treatment arising from the use of single sex actuarial factors were unjustified and, therefore, constituted unlawful direct discrimination. Advocate General Van Gerven adopted the same position as before that direct sex discrimination can be justified “if the difference in treatment is based on objective differences which are relevant, that is to say which bear an actual connection with the subject of the rules entailing unequal treatment”. However, in this particular case he argued that the difference in treatment was not justified because average life expectancy was not a sufficient basis for a difference in treatment of individual members. Once again the ECJ side-stepped the justification issue, this time by finding that capital sums such as transfer payments do not constitute pay under Article 141. Thus, the question of whether the treatment could be justified was not addressed by the Court.

The third occasion the issue came before the ECJ was in the case of *Webb v EMO Air Cargo (UK) Ltd.*⁴ The applicant was recruited to cover for another woman on maternity leave although it was anticipated that she would remain with the employer on a permanent basis. The applicant was dismissed three weeks later when it became known that she also was pregnant. She claimed that her dismissal was direct discrimination contrary to the ETD. The Commission argued that not every decision to refuse to engage a pregnant woman should amount to direct discrimination because it could lead to manifestly absurd results. Alternatively, employers should be able to justify the discrimination in certain circumstances for example, where the applicant’s pregnancy means that she is going to be unavailable for the period during which she is required. In this situation the employer should be able to modify the contract so that it would not constitute a financial or organisational constraint on the ability of the employer to recruit other staff during that period. Advocate General Tesouro took the position that the additional financial and organisational burdens on the employer could not justify the

³ [1994] IRLR 91, ECJ.

⁴ [1994] IRLR 482, ECJ. See also the case of *Dekker v Stichting* [1991] IRLR 27, ECJ.

applicant's dismissal given that she was engaged on an indefinite contract. He saw no need to consider the hypothetical situation of a woman engaged for a fixed term who would be absent for the whole of the term.

The ECJ followed the lead of the Advocate General and held that the dismissal by reason of pregnancy of a woman recruited for an indefinite period cannot be justified.

Furthermore, contrary to the submissions of the United Kingdom, dismissal of a pregnant woman cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the Directive.

In other words, the ECJ held that financial considerations could not justify the employer's treatment of the applicant. However, in its ruling the Court was careful to refer to the fact that the applicant was recruited for an unlimited period thereby leaving open the possibility that a woman recruited for a specified period would not be similarly protected.

Finally, the ECJ rejected the possibility of a justification defence in the recent *Pedersen*⁵ case. The issue in this case was whether it was direct discrimination to exclude pregnant women suffering from a pregnancy related illness from entitlement to sick pay. Under Danish employment law employees absent from work due to illness are entitled to full pay and the employer is then reimbursed by the state. By contrast, pregnant women absent from work for a pregnancy related illness more than three months before the expected date of confinement were not entitled to any pay from the employer but had a right to pre-maternity benefits paid by the state. The ECJ held that the treatment was direct discrimination contrary to Article 141 and in doing so it expressly rejected the argument of the Danish Government that a ceiling on maternity allowances could be justified.

The discrimination found in paragraph 35 above cannot be justified by the aim of sharing the risks and economic costs connected with pregnancy between the pregnant worker, the employer and society as a whole. That goal cannot be regarded as an objective factor unrelated to any discrimination based on sex

⁵ [1999] IRLR 55, ECJ.

within the meaning of the case law of the Court (see *Lewark*, cited above, paragraph 31).

The reference to the *Lewark*⁶ case is somewhat surprising as *Lewark* was a case of indirect discrimination concerning the right of part-time workers to be compensated for time spent on training courses in excess of their normal working hours. However, the point the ECJ seems to be making is that the justification defence for cases of indirect discrimination cannot be extended to cases of direct discrimination.

The precise and detailed wording of the domestic legislation appears at first sight to preclude the introduction of a justification defence for direct discrimination without parliamentary involvement. However, the HL has recently indicated that it may be possible to justify direct discrimination under the EPA. The issue arose in *Strathclyde Regional Council v Wallace*,⁷ an equal pay case brought by a number of women teachers. It was an agreed fact that the difference in pay between the women teachers and their comparators was nothing to do with sex. Even so, the tribunal held that the reasons put forward by the Council did not justify the difference in pay and, therefore, its defence under s 1(3) of the EPA failed. The decision was upheld by the EAT but overturned by the CS. On further appeal the HL agreed with the decision of the CS and held that there is only an obligation to justify a difference in pay if the reason relied upon by the employer is discriminatory. However, the HL went on to indicate that an employer could justify a difference in pay even if the reason is directly or indirectly discriminatory. Giving the only substantive judgment (with which the rest of their Lordships agreed) Lord Browne-Wilkinson made the following obiter comment.

The correct position under s 1(3) of the Equal Pay Act 1970 is that even where the variation is genuinely due to a factor which involves the difference of sex, the employer can still establish a valid defence under subsection (3) if he can justify such differentiation on the grounds of sex, whether the differentiation is direct or indirect. I am not aware as yet of any case in which the European Court of Justice has held that a directly discriminatory practice can be justified in the *Bilka* case. However, such a position cannot be ruled out since, in the United States, experience has shown that the hard and fast demarcation between direct and indirect discrimination is difficult to maintain.

⁶ [1996] IRLR 637, ECJ.

⁷ [1998] IRLR 146, HL.

Thus, the senior Law Lord appears to be of the view that there is scope for a justification defence in cases of direct discrimination although he has not indicated the circumstances in which it might apply.

REACTION

In the cases that have come before the ECJ so far, the Court has either avoided the issue of justification (*Roberts* and *Neath*) or held that the treatment in question was not justified (*Webb* and *Pedersen*). The HL has indicated that it is possible to justify direct discrimination under the EPA but this was only said obiter. Despite the fact that there has been no successful use of the defence in a direct discrimination case, the possibility of the defence existing has aroused universal criticism from academic commentators. Perhaps the most direct attack has come from Hepple in an article in the *Equal Opportunities Review*.

A dangerous heresy is threatening to subvert the developing principle of equality in Community law. This is the argument advanced by the European Commission and Advocate-General to the European Court of Justice that direct discrimination can be justified.⁸

And later on in the same article he explains the dangers of such a defence.

In my view, the introduction of a general defence of objective justification of direct discrimination would seriously undermine the conceptual framework which is necessary to prevent gender-stereotyping of women and men. It is essential to maintain the distinction between direct and indirect discrimination.

Barnard argues that the introduction of a justification defence for direct discrimination would involve a dangerous blurring of the dividing line between direct and indirect discrimination.

Direct discrimination in the context of sex or race is morally abhorrent... Consequently, this principle should not be weakened by reference to a broader category of objective justification. This distinction has served the public interest well. Its abolition would mix the concepts of direct and indirect discrimination into an unstable cocktail. The resulting brew might prove better than the two separated, but the unknown risks are as yet too dangerous to allow such an experiment with fundamental rights to be undertaken.⁹

⁸ Hepple B, 'Can direct discrimination be justified?', EOR No 55, May/June 1994, p 48.

⁹ Barnard C, 'Gender and commercial discrimination' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 6 (1996).

Ellis has described the prospect of a justification defence for direct discrimination as “a significant cloud on the horizon”¹⁰ and Matthews has suggest that this is an issue “on which we need to put some ‘clear blue water’ between ourselves and Brussels”.¹¹

To date there has been no attempt to analyse the impact of such a defence on the whole range of employment situations rather than in the context of individual cases.¹² This may be due in part to the fact that it is unclear what the boundaries of any such defence would be. Would it be mainly a financial defence or would it also apply in cases of positive action or reverse discrimination? The Commission appears to be in favour of a defence that covers both of these things. In the *Roberts* case the Commission argued in favour of a justification defence that extends to positive action when it said that employers should be able to justify discrimination that aims at substantive equality between the sexes. In *Webb* the Commission argued that employers should be able to justify their behaviour on financial grounds.

THESIS

The purpose of this thesis is to devise a model for a justification defence in cases of direct sex discrimination and to assess the likely impact of such a defence on sex equality and on the clarity of the law. It is not the purpose of this thesis to argue in favour of greater (or lesser) equality; the normative question of how much sex equality is socially desirable falls outside the scope of this thesis as it is essentially a matter for political debate, not legal inquiry. The thesis reaches the conclusion that far from necessarily favouring the interests of employers, such a justification defence is unlikely to diminish the existing level of sex equality provided for by current law. This is mainly because if the defence is constructed using sufficiently stringent criteria, there are unlikely to be many situations in which it could be successfully relied upon. Additionally, there is likely to be a considerable overlap with existing legislative and judge made exceptions.

¹⁰ Ellis E, ‘The principle of equality of opportunity irrespective of sex: some reflections on the present state of European Community law and its future development’ in Dashwood A and O’ Leary S eds, *The principle of equal treatment in EC law*, chp 9, (1997) p 174.

¹¹ Matthews P, ‘Legal concepts of justifying discrimination’, in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 3 (1996).

The one area where the defence may have a substantial impact on equality is pregnancy and maternity and here it is possible that the defence may actually result in women being better off than they are at present. In legal terms, however, one significant benefit that could accrue from the introduction of the defence is greater clarity in the law: the current law is marred by complexity, inconsistency and a lack of transparency as a result of the ECJ's efforts to avoid finding unlawful sex discrimination in some cases. A statutory recognition that direct sex discrimination can be justified in some circumstances would force the courts to be open about the fact that applicants' rights to equality have been trumped by the financial interests of employers. However, the advantage of this potential openness needs to be set against the possibility of an increase in the costs of litigation that may arise from the addition of a new defence.

The thesis starts by examining the numerous physical and biological characteristics that differ as between the sexes. These characteristics are divided into three discrete groups namely categorical sex differences, unique sex differences and distribution sex differences. This framework of sex differences provides a basis for analysing the relationship between direct and indirect discrimination in later chapters. Chapter 1 then moves on to consider the underlying purpose of sex discrimination legislation, namely equality of the sexes. Both traditional and feminist concepts of equality are considered and the framework of sex differences is used to analyse which of the many concepts of equality underlies sex discrimination legislation.

Chapters 2 and 3 examine the various elements of a claim of direct sex discrimination so that it can be understood exactly what it is that might be rendered lawful by a justification defence. Reverting back to the framework of sex differences set out at the beginning of the thesis, chapter 2 analyses which sex differences are covered by a claim of direct discrimination and which are left to the province of indirect discrimination. Chapter 3 deals with sex stereotypes, examining the commonly held fallacy that all stereotypes involve a wrong or irrational thought process and asks whether there are any situations in which sex stereotypes should be permitted.

¹² The area that has received the most attention is the employment of pregnant women on fixed term contracts following the *Webb* case. See for example, Szyszczak E, 'Pregnancy Discrimination' (1996) 59 MLR 589.

There are currently a number of legislative exceptions to the principle that direct sex discrimination is unlawful. The four main exceptions are examined in chapter 4 in order to discover their scope and underlying purpose or rationale. Chapter 5 looks at the justification defence available for claims of indirect sex discrimination. Each of the elements of the defence is examined in detail to see how it actually works in practice and whether it might have any application in the context of direct discrimination. A similar exercise is undertaken in chapter 6 in relation to disability discrimination. The various elements of the disability justification defence are examined to see if any of its elements could be used as part of a justification defence for direct sex discrimination. In addition, both forms of disability discrimination are analysed in order to see whether there is such a thing as direct disability discrimination and if so, why there is an apparent dichotomy of treatment between direct disability discrimination and direct sex discrimination given that the former can already be justified while the latter cannot.

Chapter 7 constructs a model justification defence for direct sex discrimination that is largely based on the most effective elements of the justification defences for indirect sex discrimination and disability discrimination. The model is then applied to three real cases of direct discrimination in order to illustrate how the defence would operate in practice. The chapter ends by considering the overlap between the model defence and the four main legislative exceptions.

Chapter 8 looks at some of the pressure points that have arisen in the case law on direct sex discrimination. It is argued that in the absence of an applicable legislative exception the courts have been forced to use distorted and illogical reasoning in order to avoid a finding of discrimination. In each case the model justification defence of the previous chapter is applied to see whether the presence of such a defence would have made any difference. In chapter 9 the overall impact of the model defence is examined together with other issues such as legal clarity.

TERMINOLOGY

Finally, a note on the use of the words justify and justification. In ordinary speech to justify something is to show that it is right or just or reasonable and a justification is the

reason or explanation for an act. Thus, it is common to justify one's actions.¹³ However, justification is also a term of art when used in the context of indirect sex discrimination. Under s 1(1)(b) of the SDA a practice that has a disproportionate and detrimental impact on one sex is unlawful unless it is one that the employer "cannot show to be justifiable irrespective of the sex of the person to whom it is applied". In European law the practice must be "appropriate and necessary" and "justified by objective factors unrelated to sex".¹⁴ When it is suggested that there should be a justification defence for direct discrimination the word justification is not being used as a term of art. It is not the idea that the justification defence for indirect discrimination should simply be extended to cases of direct discrimination. This is in any event impossible because the justification defence for indirect discrimination requires the employer to justify the practice for a reason other than sex. In cases of direct discrimination the reason for the treatment may be related to sex.¹⁵ For example, an employer may wish to hire waitresses instead of waiters on the basis that waitresses attract more customers. This is a reason that relates to sex. However, this does not mean that it is not possible to have a separate and different justification defence for cases of direct sex discrimination. There could be a justification defence for indirect discrimination and a separate and different justification defence for direct discrimination. Clearly, it is potentially rather confusing to have the same name for two different defences. However, every effort will be made to avoid the problem by making it clear at all times which of the two defences is being referred to.

¹³ On the linguistic uses of the concept of justification see: Bamforth N, 'Setting the limits of anti-discrimination law: some legal and social concepts' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 5 (1996) p 49.

¹⁴ See article 2(2) of EC Directive 37/97 on the burden of proof in sex discrimination cases.

¹⁵ Szyszczak E, 'The status to be accorded to motherhood: case C-32/93' (1995) 58 MLR 860 at 864.

EQUALITY AND SEX DIFFERENCES

INTRODUCTION

This chapter starts by analysing the various differences that exist between the sexes and their impact on an individual's ability to work. The second part of the chapter looks at traditional and feminist models of equality and examines which of these models is the type of equality that sex discrimination legislation aims to achieve. The chapter concludes by looking at the potential impact of a justification defence for direct sex discrimination on the goal of equality underlying the legislation.

SEX DIFFERENCES

In most cases the sex of a person is obvious even to a casual observer. There are numerous clues such as body size and shape, hair and dress that can be used to identify a person's sex. On a more detailed examination there are other biological factors that can be taken into account such as the chromosomal composition of the body cells and the form of the reproductive and sexual organs. These clues to sex identity can be termed sex differences as they all represent characteristics that differ as between the sexes although they are not necessarily characteristics which are unique to one sex.¹ They can be distinguished from non-sex differences or characteristics that can be used to distinguish between two individuals but which are neutral as an indication of sex. Examples of non-sex differences are eye colour, post code and number of off-spring. If a person has blue eyes, lives in W12 and has three children these factors are in no way indicative of the sex of the individual.

Sex differences can be divided into three kinds namely, categorical sex differences, unique sex differences and distribution sex differences. A categorical sex difference relates to a characteristic that applies to all the members of just one sex. For

¹ On sex differences generally see: Archer J and Lloyd B, *Sex and gender*, (1985); Baker M ed, *Sex differences in human performance*, (1987); Halpern D, *Sex differences in cognitive abilities*, (1992);

example, all men but no women have a prostate gland. A unique sex difference relates to a characteristic that applies to some members of just one sex. For example, at any one time some, but not all, women are pregnant. Finally, a distribution sex difference relates to a characteristic that applies to both sexes but to a differing extent or frequency. Examples of distribution characteristics include size, body strength and occupation.

Categorical sex differences

Categorical sex differences relate to characteristics that are shared by all the members of one sex but none of the members of the other sex. If all women have characteristic A and no men have A then A represents a categorical difference between the sexes. There are relatively few categorical sex differences. The main three are chromosomal composition (men have 46 chromosomes in each body cell including one X and one Y chromosome while women have 46 chromosomes including two X chromosomes) the sexual organs (eg the penis and the vagina) and the gonads (ie the testes and the ovaries). The terms 'all men' and 'all women' are only intended to cover normal cases. There are rare instances where women have some male categorical sex characteristics and visa versa. For example, there is a phenomena of so-called sex reversal in males and females. The phenomena of XX males occurs in about 1 in 20,000 new born males. Similarly, there are XY females who do not have fully formed ovaries, show no sign of breast development and have scanty pubic and auxiliary hair. Furthermore, some people are true hermaphrodites in that they have both testicular and ovarian tissues and either XX or XY chromosomes.² The fact that there are a small proportion of cases where women have some male characteristics and visa versa does not prevent these characteristics from being categorical sex differences as they do not represent normal instances of the characteristics appearing.

In general, categorical sex differences have little if any impact on an individual's ability to work. The fact that men have an X and a Y chromosome while women have two X chromosomes is not normally a pertinent factor in the work context. However, there are a few situations where categorical sex characteristics are relevant. Obvious

Nicholson J, *Men and women: How different are they?*, (1984); Margulis L and Sagan D, *Origins of sex: Three billion years of genetic recombination*, (1986).

² Archer J and Lloyd B, above, p 81.

examples are sperm donors and surrogate mothers as both of these jobs require the presence of particular categorical differences.

Unique sex differences

A unique sex difference relates to a characteristic that applies to some but not all the members of just one sex.³ As with categorical sex differences, unique sex differences are relatively few in number. Furthermore, women have more unique characteristics than men. Three of the main female unique sex characteristics are pregnancy, childbirth and breast feeding. An example of a male unique sex characteristic is growing a beard. Categorical sex differences can give rise to unique sex differences if ill health occurs. For example, having ovaries is a categorical sex difference. However, if a woman develops cancer of the ovaries, the illness (a condition that affects only some women) is a unique sex difference.⁴

Some unique sex characteristics have an impact on an individual's ability to work and others do not. In most cases it is irrelevant whether a man has a beard although there are some situations in which it poses a problem eg a beard can be a health risk in some aspects of food production.⁵ Similarly, menstruation is largely irrelevant except where the period pain is so severe that it results in the woman's absence from work.⁶ By contrast, pregnancy and maternity always have some impact on an individual's ability to work if only to the extent that the woman has a short period of time off work in order to give birth.

Distribution sex differences

A distribution sex difference exists where a characteristic applies to both sexes but to varying extents. One source of distribution sex differences is the absence of a unique sex

³ This classification is also used by MacKinnon C in, *Sexual harassment of working women*, (1979) p 114.

⁴ This does not mean that it will always be treatment on the ground of a unique sex difference to dismiss a woman with ovarian cancer. Although ovarian cancer is a unique sex difference, ill-health generally is not unique to women and therefore a sickness policy that does not differentiate between types of illness will not involve treatment on the ground of a unique characteristic. This point is dealt with in more detail in chapter 2.

⁵ See for example *Panesar v Nestle Co Ltd* [1980] IRLR 64, CA. This case is discussed in more detail in chapter 2.

⁶ See for example *Boyle v Falkirk District Council* EOR Discrimination Case Law Digest, No 11, Spring 1992, p 5, where the applicant was given a final written warning in respect of absences which were due to dysmenorrhoea (period pain).

characteristic. For example, the class of people who are not pregnant will contain some women and all men. Similarly, the class of people who do not have cancer of the prostate gland will include all women but only a proportion of men. This is an important point because it means that special treatment on the ground of a unique sex characteristic results in disadvantage to both sexes. If all pregnant women are given a bonus of £50 both women and men suffer a detriment on the ground that they are not pregnant. As a result, special treatment on the ground of a unique sex characteristic can result in a claim of indirect sex discrimination which, if it is not covered by an express exception in the legislation, would need to be justified by the employer.

The range of distribution sex differences is enormous. The difference in average size between women and men means that for almost every body dimension there is a sex difference.⁷ Height, weight, strength, reach and flexibility are all examples of distribution sex differences. Sensory functioning is another area where there is a large number of sex differences. Studies in the areas of audition, vision, taste, smell and sensitivity to touch have all found examples of sex differences although in some cases, for example in relation to smell, the differences have been relatively small.⁸ In the field of cognition and intelligence, the specialised skills that show the greatest sex differences are verbal, mathematical and visual-spatial ability.⁹ In addition, there are the huge number of social differences between the sexes such as the allocation of child care responsibilities, work patterns, dress styles etc.. However, it should be noted that in relation to many distribution characteristics the intra sex differences are greater than the inter sex differences.¹⁰

In some cases the distribution characteristic is one that either exists or does not exist. For example, a person either has or does not have a driving licence. Other characteristics can apply to a greater or lesser degree. This can be true of characteristics that initially appear to be dichotomous. For example, handedness is a continuum and a person can be more or less right handed or left handed.¹¹ Where a characteristic is capable of continuous measurement the variation between the sexes can be presented in

⁷ Baker M, above, chp 7.

⁸ Baker M, above, chp 2.

⁹ Halpern D, above, p 64 and Baker M, above, p 41.

¹⁰ *Equality for women*, Cmnd 5724, (1974), para 16.

¹¹ Halpern, p 41.

the form of distribution curves. Set out below are four fictitious graphs that could result from a test of hearing thresholds of a particular frequency for two sample groups, one of men and one of women. The horizontal axis represents volume and the vertical axis represents the percentage of women and men who can hear the noise at a range of volumes.

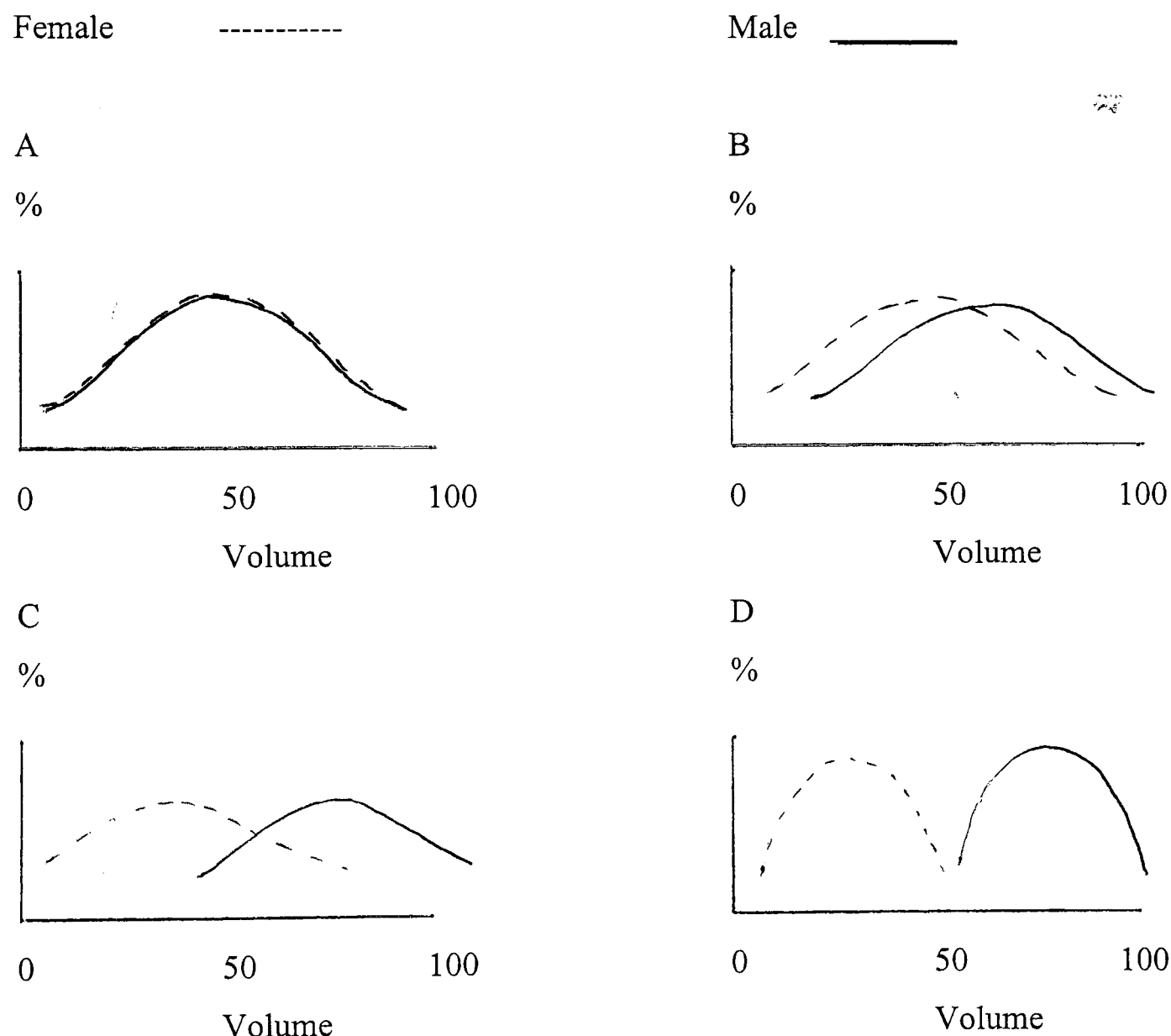


Figure A shows the situation where there is no difference in distribution for the scores of women and men. This means that for the frequency being tested, identically the same percentage of women and men will hear the noise at any given volume. Figures B, C and D are all examples where the means differ (in these cases, on average, the females excel). In Figure B there is substantial overlap between the sexes, less so in Figure C and no overlap in Figure D. In the case of Figure D, the distribution indicates that the woman with the worst sense of hearing can hear better the man with the best sense of hearing.

Figure A represents a situation in which there is no sex difference and therefore the application of a hearing criterion as for example, a condition of employment, would not have an disproportionate impact on the sexes. At the other end of the spectrum, figure D represents such a large sex difference that its impact would be the same as the application of a categorical sex difference. The cut-off point between the sexes is around 75 points of volume. If an employer were to apply a selection criterion of a hearing ability of 75 points at this frequency the effect would be to exclude all men from the job. Of course, figure D is entirely fictitious and it may be that there are very few, if any, real examples where there is no overlap at all between the sexes in relation to a particular characteristic. However, this phenomena could arise between distinct groups of women and men, even if the groups are relatively large. For example, on average women have only 44 percent of the upper body strength of men.¹² In a group of 50 women and 50 men, the situation may arise where all of the men are able to lift a box that none of the women can lift. In this case, the ability to lift this box would have the same impact as a categorical sex difference if used as a selection criterion.

In figure B there is only a very small difference between the sexes. In order to be significant in statistical terms the difference has to be large enough to exclude the possibility that the result is caused by random error. Psychologists have a convention whereby the potential for random errors is assumed to be 5%. Although, depending on the nature of the research, significance levels may be set at 1% or even less.¹³ It seems that there is no direct correlation between significance and disproportionate impact in cases of indirect sex discrimination. Under s 1(1)(b)(i) of the SDA the size of the difference must be such that the practice in question has an impact on a considerably smaller proportion of one sex. The definition of indirect sex discrimination in the BPD refers to a practice which disadvantages a substantially higher proportion of one sex.¹⁴ The ECJ considered the question of disproportionate impact in the recent case of *R v Secretary of State for Employment ex parte*

¹² Baker M, above, p 109.

¹³ For a more detailed explanation of statistical significance see: Robson C, *Experiment, design and statistics in psychology*, (1983), p 32 and Halpern D, above, p 44. See also: Allen R, *The use of statistics in discrimination law*, Unpublished notes from a lecture to the Employment Lawyers Association, 5 July 1995.

¹⁴ EC Directive 37/97. The Directive is due to be implemented no later than 1 January 2001.

Seymour Smith and Peréz.¹⁵ The case involved a challenge to the 1985 Order increasing the qualifying period for claims of unfair dismissal from one to two years. The evidence was that in 1985 the proportion of men who could comply with the two year requirement was 77.4% and the proportion of women who could comply was 68.9%. In other words, there was a difference of 8.5 percentage points. Although there is no direct finding on this point in the judgment, given the size of the sample it is highly unlikely that this is a random result and, therefore, the difference is significant in statistical terms.

The ECJ held that the correct test for disproportionate impact is “whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years’ employment”. While leaving the matter to the national court to decide, the ECJ went on to state that: “Such statistics do not appear, on the face of it, to show that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by the disputed rule.” Given this indication from the ECJ it seems that mere statistical significance is not enough to give rise to a claim of indirect discrimination. However, what is not clear from the judgment is how large the difference has to be in order to satisfy the test of being considerable.

As with unique sex differences, some, but not all, distribution characteristics can have an impact on an individual’s ability to work. At one end of the scale characteristics such as being a primary child carer can have a significant impact in relation to the hours a person can work. Similarly, physical characteristics such as height, strength and flexibility may all have an impact depending on the job involved. Physical strength is much more important in a fire fighter than in a librarian. By contrast, an acute sense of smell, like so many other distribution differences, is relevant in only a few settings eg wine tasting.

EQUALITY

Traditional theories of equality

The concept of equality can be expressed in many different ways. In its most basic formulation it can be used as a statement of fact ie people are equal. In this context equal can mean equal in terms of physical characteristics or equal in terms of moral worth. As

¹⁵ [1999] IRLR 253, ECJ. For a note on this case see: Barnard C and Hepple B, ‘Indirect discrimination: interpreting *Seymour-Smith*’ (1999) 58 CLJ 399.

Williams points out, the factual statement that all persons are equal in terms of physical characteristics is obviously incorrect: "to say that all men are equal in all those characteristics in respect of which it makes sense to say that men are equal or unequal, is a patent falsehood".¹⁶ Since humans come in all shapes and sizes and with differing levels of intelligence, the only characteristic common to all people is their humanity. The maxim of equality therefore becomes reduced to the weak statement that all people are human. Williams argues that even in this weak form the statement is not entirely vacuous. For example, societies that treat certain races differently have often persuaded themselves that the people in question do not have the same capacity to feel pain and affection as other humans. In this situation, it is certainly useful to point out that people are equally human. However, Williams notes that: "if all that the statement does is to remind us that men are men, it does not do very much, and in particular does less than its proponents in political argument have wanted it to do."¹⁷

The other sense in which people are often said to be equal is in terms of moral worth. The idea of equal moral worth is found in many religions. It is also found in secular philosophy in the writings of Kant.¹⁸ As Williams explains, in order for all people to be equal in terms of moral worth, moral worth cannot relate to physical characteristics. For example, if intelligence is relevant to moral worth, since some people are more intelligent than others, people cannot be said to be morally equal.

¹⁶ Williams B, 'The idea of equality' in Laslett P and Runciman WC eds, *Philosophy, Politics and society*, (1972) p 110.

¹⁷ William's concept of being equally human is very similar to the idea of treatment as an equal put forward by Ronald Dworkin in his essay 'Reverse discrimination' in *Taking rights seriously* (1987) p 223 at p 227. Dworkin argues that the right to treatment as an equal means that one person's interests should be treated as fully and sympathetically as the interests of any other person. Dworkin uses the example of a law school's admissions policy.

Any standard will place certain candidates at a disadvantage as against others, but an admission policy may nevertheless be justified if it seems reasonable to expect that the overall gain to the community exceeds the overall loss, and if no other policy that does not provide a comparable disadvantage would produce even roughly the same gain. An individual's right to be treated as an equal means that his potential loss must be treated as a matter of concern, but that loss may nevertheless be outweighed by the gain to the community as a whole.

Expressed in these terms, Dworkin's right to treatment as an equal becomes remarkably similar to Williams' definition of equality that people are equal because of their common humanity. Under Williams' definition humans must be accorded respect because of their capacity to form relationships, suffer, feel affection and have hopes and aspirations. Dworkin seems to be saying much the same thing when he argues that everyone's interests should be taken into consideration when deciding what is for the greater good of the community.

¹⁸ Kant's theory is summarised by Williams B, above, at p 114.

Therefore, it is necessary to detach moral worth from all physical characteristics. The result is that moral worth becomes a transcendental characteristic:

... man's capacity to will freely as a rational agent is not dependent on any empirical capacities he may have - and, in particular, is not dependent on empirical capacities which men may possess unequally - because, in the Kantian view, the capacity to be a rational agent is not itself an empirical capacity at all.¹⁹

What is the effect of all people having the same transcendental moral worth? According to Kant it means that all people are entitled to be treated with respect. This provokes the question what is meant by the notion of respect? Williams refers to Kant's celebrated injunction "treat each man as an end in himself, and never as a means only" and suggests that treating someone with respect means in part, looking at life from their perspective. Williams gives the example of a man who has spent his whole life trying to build a machine which could never work. From a technical point of view the man is a failed inventor. From the human point of view he is a man who wished to be a successful inventor and who persevered at his task. Treating people with respect means trying to understand each person's consciousness of his or her own life and activities. By making moral worth entirely transcendental, it is difficult to see how the concept of equal moral worth adds anything to the concept that all people are human and have, amongst other things, the capacity to form relationships, suffer, feel affection and have hopes and aspirations. The idea of treating humans with respect because of their equal moral worth seems to amount to no more than taking into account the fact that they have these human characteristics.

A much stronger formulation is the statement of political aim that people should be treated the same irrespective of their differences. For example, in the process of dividing-up a loaf of bread between a group of people, each will get the same amount of bread irrespective of how hungry they are or how much they need to eat. This formulation of equality may be appropriate in some circumstances, for example the principle that everyone has one vote in an election. However, the formulation leads to absurd results if *all* benefits and burdens are distributed on this basis. For example, reading glasses would be distributed to everyone and not just to those with bad eye sight. This formulation of equality shows how important it is that some account is taken of people's differences.

A formulation of equality that takes differences into account is the idea that people should be treated the same only if they are alike. This formulation of equality was first propounded by Aristotle who said: "Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness." The difficulty with this formulation is that it requires a determination of when two people are alike and when a form of treatment is alike.²⁰ No two people are alike in every respect. (Two people can be alike in that they are both human or have equal moral worth but this leads to the alternative formulation of equality that all people are equal which is dealt with above.) Only immaterial symbols and forms such as ideal numbers and geometric forms are identical. Two people can only be the same in relation to a defined standard by which their likeness can be measured. For example, hair colour, height and profession are all standards by which sameness can be measured. Two people, A and B, can be the same in that they both have brown hair. In all other respects, other than the standard by which their sameness is measured, A and B may be completely different. Similarly, treatment requires a standard by which likeness can be measured. If the treatment in question is the gift of a book, likeness could be determined by a multitude of factors such as the colour, price or subject matter of the book.

The second half of Aristotle's formulation requires that things which are unlike should be treated unlike in proportion to their unlikeness. The same problem arises here in that unlikeness needs a standard by which it can be measured or defined. If P has two 'A' levels and Q has 3 'A' levels are they alike or unlike? They both have 'A' levels but P has one more than Q. The problem is exacerbated by the fact that the treatment must be in proportion to the unlikeness. In relation to P and Q does this mean that if P is entitled to a place at university Q is entitled to two thirds of a place?

¹⁹ Williams, above, p 116.

²⁰ Phillip Weston argues that this absence of definition means that Aristotle's formulation of equality lacks any substantive moral content and that it collapses into a simple statement of rights: see 'The empty idea of equality' (1982) 95 Harvard Law Review 537. Weston gives a more detailed explanation of why equality is an empty idea in 'On "Confusing Ideas": Reply' (1982) 91 Yale LJ 1153 at 1155. For a criticism of Weston's original article see Burton S, 'Comment on "empty ideas": logical positivist analysis of equality and rules' (1982) 91 Yale LJ 1135. See also the criticisms of Fredman S, 'Less Equal than others - equality and women's rights', in Gearty C and Tomkins A eds, *Understanding human rights*, chp 9 at 201.

In practice, Aristotle's formulation is impossible to apply without identifying some underlying standard or right. For example, Loenen²¹ tries to rely on the second half of the formulation to support her argument for maternity rights. However, in order to determine what the different treatment should be Loenen is compelled to introduce the concept of a right to work.

If one considers the treatment from the perspective of the right to work and the right to have a family, it seems clear that the treatment given is just "equal", be it that it is not the same. I do not think that there is anything "preferential" in guaranteeing women equal rights to work and family. In Aristotelian terms, the treatment is just proportional to the perceived difference in position of men and women and thus remains entirely within the concept of equality.

Loenen starts from the position that women and men are unlike in terms of pregnancy. Therefore, they should receive different but proportional treatment. But in order to determine the different treatment to which women are entitled she needs to define the underlying right which she believes men have ie the right to work and have a family. Her argument therefore is not based on Aristotle's concept of different but proportional treatment but on the underlying normative standard that women and men should have the right to work and have a family.²²

An alternative formulation of equality is the idea of equality of opportunity. This formulation is used when there are insufficient goods or resources to meet demand. Due to its limited nature, not everyone can have the desired good. The notion of distributing the good on the basis of need or some other socially relevant criteria is replaced with the notion of an equal opportunity to compete for the limited good.²³ There are both weak and strong forms of this concept. In its weak form equality of opportunity could be described as a requirement that the condition which determines allocation should be appropriate and rational for the good in question. For example, an employer could operate a policy under which promotion to a senior job requires a minimum number of

²¹ 'Comparative legal feminist scholarship and the importance of a contextual approach to concepts and strategies: the case of the equality debate' (1995) 3 Feminist Legal Studies p 71.

²² Loenen seems to accept this point later on in her article when she says that Aristotle's concept of equality is silent on the content of the treatment of likes and unlikes although she still argues that the idea has some use: "I do acknowledge, however, that the content of equality (or rather, the content of the *treatment* which should be equal) will depend on the overall values, principles and aspirations prevalent in a given society. We cannot escape our historic boundaries and think beyond them. In that sense, equality will always be contextually defined and thus contingent. But that is not the same as "empty". These values, principles and aspirations must be our point of reference for interpreting equality and giving it content."

²³ See Williams B, above, p 124.

years' service at a lower grade. On the face of it, the requirement for promotion is appropriate and rational. Assume that the employer operates another policy under which only people over 6ft tall are allowed to work as computer processors. If this criterion is neither rational nor appropriate there is no equality of opportunity.

Equality of opportunity in its weak form will not result in an even distribution of goods as between different groups in society where the members of a group suffer from natural or social disadvantages which stop them from competing as effectively as the members of other groups. In this situation Williams recognises that genuine equality of opportunity is not achieved.

It seems then that a system of allocation will fall short of equality of opportunity if the allocation of the good in question in fact works out unequally or disproportionately between different sections of society, if the unsuccessful sections are under a disadvantage which could be removed by further reform or social action.²⁴

A strong form of equal opportunity would require society to remove disadvantages which prevent individuals from competing on the same level. For example, to ensure genuine equality of opportunity in the allocation of places at university, less intelligent children would receive additional schooling. In its stronger form, equal opportunity has more to do with distributing goods on the basis of people's differences than their similarities. To this extent, it has some similarities with the idea of distributive justice as it is used in social contract theory.²⁵

Feminist concepts of equality

A fundamental problem that has confronted feminists trying to apply traditional concepts of equality has been the sameness/difference between women and men. The difficulty seems to have been not so much whether they are different, but which approach, sameness or difference, is better at achieving the ultimate goal of equality. Bacchi argues that historically feminists have become divided on the sameness/difference point not because they disagree on whether there are differences (although they may disagree

²⁴ Williams B, above, p 127.

²⁵ Williams B, above, p 120. For an explanation of the principles of distributive justice see: Rawls J, 'Justice as fairness' in Laslett P and Runciman WC eds, *Philosophy, politics and society*, (1972) p 132 and Rawls J, *A theory of justice*, (1971).

about the extent of the differences and whether they are biological or cultural) but on which approach is more likely to achieve the end result of improving women's lives.²⁶

The way in which the law treats a whole range of differences including age, race, gender, ethnicity, religion and disability has been studied by Minow who highlights what she calls the dilemma of difference.²⁷ The stigma of difference can be created both by ignoring and focusing on difference.

When does treating people differently emphasise their differences and stigmatise or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatise or hinder them on *that* basis? The dilemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation. Government neutrality may be the best way to assure equality, yet governmental neutrality may also freeze in place the past consequences of differences.²⁸

Littleton divides feminist positions in the sameness/difference debate into symmetrical and asymmetrical responses.²⁹ The former has two models. Assimilation, the model most often accepted by the courts, is that given a chance women could be just like men and, therefore, they should be treated just like men. Under the assimilation model any differences between women and men are minimised. The second model, androgyny, also argues that women and men are similar but argues that there should be some androgynous mean which both women and men are compared with. As Littleton explains: "In order to be truly androgynous within a symmetrical framework, social institutions must find a single norm that works equally well for all gendered characteristics." It is arguable whether it is really possible to find an androgynous norm given that the existing structure is already so male based.

Asymmetrical approaches argue that differences should be accepted and dealt with. At one end of the spectrum is the accommodation model which argues that biological differences should result in different treatment but that cultural differences should be treated on an androgynous basis. Accommodationists argue that it is important to limit different treatment to biological differences because otherwise cultural differences will be used to limit women's spheres of activity. A second asymmetrical

²⁶ *Same difference: feminism and sexual difference*, (1990) p xi.

²⁷ *Making all the Difference: Inclusion, exclusion, and American law* (1990).

²⁸ Minow M, above, p 20.

²⁹ Littleton C, *Reconstructing sexual equality*, (1987) 75 Cal L Rev 1279.

approach is the special rights model. This model accepts that women and men are different in cultural and biological ways and that the cultural differences are rooted in biological differences. It argues that women should be entitled to special rights based on their different needs.

Littleton puts forward her own asymmetrical model which she terms the model of equality as acceptance.

The difference between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived-out equality of those persons. To achieve this form of sexual equality, male and female "differences" must be costless relative to each other.³⁰

Unlike accommodationists, Littleton would take into account biological and cultural differences.

While not endorsing the notion that cultural differences between the sexes are biologically determined, it does recognise and attempt to deal with both biological and social differences. Acceptance does not view sex differences as problematic per se, but rather focuses on the ways in which differences are permitted to justify inequality. It asserts that eliminating the unequal consequences of sex differences is more important than debating whether such differences are "real," or even trying to eliminate them altogether.

A more radical approach is taken by MacKinnon who questions the relevance of sameness/difference in the equality debate. MacKinnon points out that: "to treat issues of sex equality as issues of sameness and difference *is to take a particular approach*. I call this the difference approach because it is obsessed with the sex difference."³¹ MacKinnon questions Aristotle's formulation of equality that in order to get the same treatment two people should be the same.

What is missing in the difference approach is what Aristotle missed in his empiricist notion that equality means treating likes alike and unlikes unlike, and nobody has questioned it since. Why should you have to be the same as a man to get what a man gets simply because he is one?³²

MacKinnon's main argument against the sameness/difference debate is the lack of a gender neutral standard against which sameness/difference can be measured.

Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his

³⁰ Littleton C, above, p 1284.

³¹ 'Difference and dominance: on sex discrimination' in *Feminism unmodified* (1987) p 32.

³² MacKinnon C, above, p 37.

measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.³³

MacKinnon argues that in relation to practically every respect in which men are different from women, society is structured on the basis of the male norm. For example, men's needs define car insurance and male working patterns define career progression. However, because the male standard is considered to be natural, arguments that society should be changed to accommodate the female standard look like arguments for special treatment based on the difference in gender. For example, full-time working is the standard but it is also the male norm. A woman who wants to work part-time appears to be asking for her sex in terms of her child caring responsibilities to be taken into account. On the other hand, full-time working that already accommodates the male norm is not perceived as offering special treatment to men. As a result, the sameness/difference debate inevitably results in women looking like they want special treatment.

MacKinnon does not dispute that the sameness/difference approach has been effective in some spheres. It has, for example, got women into jobs which were previously closed to them. Arguably, the sameness/difference approach has been most successful in areas where it has been relatively easy for women to conform to the male norm. MacKinnon has an alternative approach. She sees equality not in terms of difference, but in terms of power; of male supremacy and female subordination. She calls this the dominance approach. It centres on the way in which women are relegated to a condition of inferiority in a whole range of spheres; poverty, violence against women, work segregation, prostitution and pornography. MacKinnon points out that these experiences can not be dealt with under the difference definition of equality because these matters almost uniquely happen to women. As a result, they are not considered to raise equality issues. MacKinnon points out that this approach has become the model for race discrimination.

It was based on the realisation that the condition of Blacks in particular was not fundamentally a matter of rational or irrational differentiation on the basis of race but was fundamentally a matter of white supremacy, under which racial differences became invidious as a consequence.³⁴

³³ MacKinnon C, above, p 34.

³⁴ MacKinnon C, above, p 42.

In the same way, MacKinnon sees gender inequality as a question of male supremacy. Inequality has arisen not out of the differences between women and men but the power which men have over women and men's ability to structure society to the disadvantage of women. MacKinnon's approach is summarised by Littleton in the following way: "If a law, practice, or policy contributes to the subordination of women or their domination by men, it violates equality. If it empowers women or contributes to the breakdown of male domination, it enhances equality."³⁵

Equality and sex discrimination

The kind of equality that underlies the legislation on sex discrimination can be discovered by examining the way in which the legislation deals with the three kinds of sex differences set out in the first part of this chapter ie categorical, unique and distribution sex differences.³⁶ All sex discrimination legislation, either expressly or implicitly through case law, distinguishes between two forms of sex discrimination namely direct or indirect discrimination. The dividing line between the two forms of discrimination is somewhat unclear but broadly speaking direct sex discrimination is concerned with categorical sex differences, indirect discrimination deals with distribution sex differences and unique sex differences are split between the two. Thus, some unique sex differences come under the ambit of direct discrimination (eg pregnancy and maternity) while others (eg beards) are probably covered by indirect sex discrimination.³⁷

Direct sex discrimination is unlawful unless it is covered by one of the express exceptions in the legislation.³⁸ This means that there is a general presumption that all detrimental treatment on the ground of any categorical sex difference (and some unique sex differences) is prohibited. By contrast, detrimental treatment that arises out of a distribution sex difference (and some unique sex differences) is only unlawful if the employer (or, where the treatment is enshrined in legislation, the government) fails to justify its actions. For example, if an employer decides to select part-time workers for redundancy before full-time workers the resulting detriment (ie the dismissals) will only

³⁵ Littleton, above, p 1300.

³⁶ Sex discrimination legislation is not the only legislation that has as its aim equality between the sexes, see for example the maternity provisions in Part VIII of the ERA 1996.

³⁷ The treatment of unique sex differences is considered in more detail in chapter 2.

³⁸ The four main legislative exceptions are considered in chapter 4.

be unlawful if the employer is unable to justify the selection policy. The mechanics of the justification defence are discussed in detail in chapter 5 but, in essence, it requires the employer to show that there is a reason for the difference in treatment that is not related to sex, there is no other less discriminatory way of achieving the same objective and the benefit to the employer outweighs the detriment to the employee. The result is that distribution sex differences are given a lower level of protection than categorical sex differences.

Considered in terms of the differing theories of equality sex discrimination legislation is based upon a weak asymmetrical model of equality which aims to relieve economic disadvantage in the workplace.³⁹ Sex differences, both cultural and biological, are recognised and some effort is made to remedy any disadvantage suffered as a result. But, in the words of Littleton, they are not always rendered “costless”. Categorical sex differences can result in detrimental treatment if one of the legislative exceptions applies and distribution sex differences are unprotected where the employer can justify the detrimental treatment. Thus, the legislation falls short of achieving total equality in the employment context. In order to render all sex differences “costless” some⁴⁰ of the legislative exceptions would have to be repealed as would the justification defence in cases of indirect sex discrimination. The result would be that all sex differences would have to be accommodated by employers (although they could be assisted financially by the state as they already are in some areas eg statutory maternity pay). For example, employers would have to arrange working hours to fit in with women’s childcare responsibilities. Inevitably, accommodating all sex differences is likely to lead to a loss of productivity for some employers. Although, the state could reduce the impact on employers either by direct financial assistance or by reducing the need for accommodation. For example, the state could reduce the need for flexible working by the provision of affordable and accessible childcare.

Sex discrimination legislation represents a compromise between complete asymmetrical equality where all sex differences are rendered “costless” and the need of

³⁹ See Ellis E, ‘The definition of discrimination in European Community sex equality law’ (1994) 19 ELR 563 at 564 and Bernard N, ‘What are the purposes of EC discrimination law?’ in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, (1996) 84.

⁴⁰ The reason why only some of the exceptions would have to be repealed is that certain of them allow employers to give more favourable treatment to one sex on the basis of sex characteristics eg the exceptions for pregnancy and maternity, and positive action.

employers operating in a market economy to make a profit (or, if it is a non-profit making organisation, operate efficiently).⁴¹ Any attempt to introduce a stronger model of equality will inevitably have a financial impact on employers. Thus, the removal of the justification defence for indirect discrimination would strengthen the degree of equality sought by the legislation but, at the same time, it would reduce the ability of employers to make a profit. Similarly, making it easier for employers to justify indirect sex discrimination or widening the legislative exceptions detracts from the goal of equality while at the same time increasing the scope for employers to make a profit. At first glance it would appear that the introduction of a justification defence for cases of direct discrimination would weaken the goal of equality to a considerable extent because it would reduce the extent to which employers are obliged to accommodate sex differences. However, this is not necessarily the case. The impact of the defence depends on a number of factors. First, the scope of the defence and how often it is likely to be used. If the defence is worded in such a way that it only has a limited impact it is unlikely to undermine the goal of equality to any significant extent. Second, the extent to which the defence overlaps with the existing legislative exceptions. Third, the extent to which the defence could be used as a model for limiting the justification defence that applies in cases of indirect sex discrimination. These and other related issues are examined in later chapters in an effort to assess the impact on equality of an additional justification defence.

CONCLUSION

Sex discrimination legislation is based on an asymmetrical model of equality in that it aims to neutralise the negative impact of sex differences. However, it is a weak model of equality because not all sex differences are completely protected. Some categorical and unique sex differences are left unprotected by specific exceptions in the legislation. The extent to which distribution characteristics are protected depends on the ability of the

⁴¹ For an analysis of the limiting effects of economic arguments on equality see: Fredman S. 'European Community Discrimination Law: a critique' (1992) 21 ILJ 119 at 130. For the deference of the ECJ to

employer to justify the detrimental treatment. Thus the existing model of equality represents a compromise between the goal of equality and the financial needs of employers. The introduction of a justification defence for cases of direct sex discrimination is likely to have an effect on this balance. The key question is how large will the effect be and in what direction: towards or away from the goal of equality?

economic arguments see: Docksey C, 'The principle of equality between women and men as a fundamental rights under Community law' (1991) 20 ILJ 258 at 275.

DIRECT SEX DISCRIMINATION

INTRODUCTION

In the SDA direct discrimination is defined as less favourable treatment on the ground of sex. The ETD refers to discrimination on the ground of sex but does not define it. The scheme under the EPA is slightly different in that an applicant must establish that he or she is employed on work of equal value with a person of the opposite sex. A female applicant is then entitled to have no less favourable terms in her contract than those of her male comparator unless the employer can prove that the difference in treatment is for a reason unrelated to sex. Article 141 sets out the principle of equal pay for work of equal value which is explained in the EPD as the “elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration”. The ECJ has held that this covers both direct and indirect discrimination.¹ Despite the different ways in which these provisions are structured, for all of them the concept of direct discrimination can be reduced to the relatively simple formula of detrimental treatment on the ground of sex. This formula can itself be broken down into its three constituent elements namely detrimental treatment, sex and causation.² The purpose of this chapter is to consider in detail these three constituent elements of a claim of direct sex discrimination.³ The chapter starts with a definition of sex based on sex differences then moves on to detriment and causation. The final section of the chapter deals with the burden of proof.

¹ See *Jenkins v. Kingsgate* [1981] 2 CMLR 24, ECJ and *Bilka-Kaufhaus v. Hartz* [1986] 2 CMLR 701, ECJ.

² In her examination of the definition of sex discrimination in European Community law Evelyn Ellis identifies only two elements, namely adverse impact and causation, as the elements that underpin any system of anti-discrimination law. Although she does not mention sex as a separate element it is implicit in her argument that the adverse treatment must be on the ground of sex: see ‘The definition of discrimination in European Community Sex Equality Law’ (1994) 19 ELR 563.

³ There is another form of direct sex discrimination that arises from the application of a sex stereotypes. This form of direct discrimination is considered in chapter 3.

DEFINING SEX

Despite the fact that sex is a fundamental element of direct discrimination it is not defined in the legislation. As a result, the courts have been left to apply their own definition of sex on a case by case basis. This section outlines the possible definitions of sex that could be used and considers how the courts have approached the issue. As indicated in chapter 1, the differences between women and men can be divided into three groups, namely categorical sex differences, unique sex differences and distribution sex differences.⁴ Categorical sex differences relate to characteristics that apply to all the members of one sex and to no members of the other sex. The main categorical sex differences are chromosomal composition, the gonads and the sexual organs. Unique sex differences relate to characteristics that apply to some of the members of just one sex. Examples of female unique sex characteristics are pregnancy and menstruation. An example of a male unique sex characteristic is having a beard. Distribution sex differences relate to characteristics that apply to both sexes but in varying distributions. Distribution differences include characteristics such as height, weight, shoe size and a whole range of social differences such as income level and part-time work.

Which of these three sex differences are included in the definition of sex? There is no doubt that categorical sex differences are included as they represent the narrowest possible definition of sex given that they relate to characteristics that apply to all the members of one sex. For example, it would certainly be sex discrimination to differentiate on a detrimental basis between employees with testes and employees with ovaries. On the other hand, distribution sex differences are excluded from the definition of sex because they are dealt with under the separate heading of indirect discrimination. Indirect discrimination deals with the situation in which a person is disadvantaged because he or she cannot comply with a condition or requirement because of the existence of a distribution sex difference. For example, a minimum height requirement for a job involves the application of a distribution sex difference and, therefore, it could give rise to a claim of indirect discrimination.⁵

⁴ For an analysis of the main types of differences between racial groups see Allport G, *The nature of prejudice*, (1958) p 94.

⁵ Indirect discrimination is considered in more detail in chapter 5.

What is less clear is whether the definition of sex extends to some or all of the unique sex characteristics. If the definition of sex does not include unique sex differences, characteristics such as pregnancy can only give rise to a claim of indirect discrimination with the potential of a justification defence by the employer. To date, the debate has almost entirely focused on the unique characteristic of pregnancy.⁶ The initial reaction of the domestic courts was to find that pregnancy was not covered by the definition of direct discrimination in the SDA.⁷ This position was subsequently reversed but, at the same time, the courts limited the protection afforded by the SDA by disassociating pregnancy from its consequences and finding that the reason for the treatment was not pregnancy per se but the consequences of pregnancy in terms of the woman's absence from work.⁸ This analysis was subsequently approved by the HL in *Webb v. EMO Air Cargo* before the case went to the ECJ.⁹

There can be no doubt that in general to dismiss a woman because she is pregnant or to refuse to employ a woman of childbearing age because she may become pregnant is unlawful direct discrimination. Childbearing and the capacity for childbearing are characteristics of the female sex. So to apply these characteristics as the criterion for dismissal or refusal to employ is to apply a gender-based criterion, which the majority of this House in [*James v. Eastleigh*] held to constitute unlawful direct discrimination.¹⁰

The position of the ECJ has always been that in relation to the ETD detrimental treatment on the ground of pregnancy is direct discrimination. In the case of *Dekker v. Stichting* the ECJ held that "As employment can only be refused because of pregnancy to a woman, such a refusal is direct discrimination on grounds of sex."¹¹ The ECJ confirmed this approach when it gave judgment in the *Webb*¹² case although it expressly rejected the use of the sick man comparison and the attempts of the domestic courts to limit the protection afforded to pregnancy women by disassociating pregnancy from its consequences. However, the ECJ has not adopted a consistent position in relation to Article 141. In *Gillespie v. Northern Health and Social Services Board* the ECJ was

⁶ The pregnancy cases are considered in much more detail in chapter 8.

⁷ *Turley v. Allders Department Stores Ltd* [1980] IRLR 4, EAT.

⁸ *Hayes v. Malleable Working Men's Club* [1985] IRLR 367, EAT.

⁹ [1993] IRLR 27, HL.

¹⁰ The comparison with *James v. Eastleigh* is not strictly correct as the gender-based criterion in *James* was different ages for free admittance for women and (ie a categorical sex difference) men and not a unique sex characteristic such as pregnancy. It is not therefore, authority for the proposition that direct discrimination covers detrimental treatment on the ground of a unique sex characteristic.

¹¹ [1991] IRLR 27, ECJ.

asked to rule on whether an employer can reduce a woman's pay during maternity leave.¹³ Reducing a woman's pay during maternity leave is of course a detriment. The primary issue therefore, is whether the treatment is on the ground of sex. The ECJ held that as a woman is not in a comparable position with a man the treatment is not on the ground of sex.

The present case is concerned with women taking maternity leave provided for by national legislation. They are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work.

On this basis the ECJ held that it is not contrary to Article 141 to reduce a woman's pay during her period of maternity leave.¹⁴ The decision in *Gillespie* means that for the purposes of pregnancy the ECJ has applied a different interpretation of sex to the ETD and Article 141.

The *Gillespie* case demonstrates that the courts are unlikely to adopt a consistent approach to unique sex differences and therefore it is very difficult to predict where they will draw the line. For example, menstruation and growing a beard are both unique sex differences and, therefore, there is no logical reason for distinguishing between the two but the courts are unlikely to treat them in the same way. The consequences of including a beard within the definition of sex is illustrated by the race case of *Panesar v. the Nestlé Co Ltd*.¹⁵ The applicant was a male Sikh who was refused employment in the respondent's chocolate factory on the ground that he wore a beard. The tribunal accepted that the requirement for men to be clean shaven was a condition with which a smaller proportion of Sikhs could comply. However, they accepted the employer's argument that the condition was justifiable on hygiene grounds. In particular, the respondent was concerned that strands of hair would fall into the food where they could be a source of infection. Had the applicant chosen to bring a sex discrimination claim it is unlikely that the court would have classified the case as direct discrimination thereby removing from the employer the possibility of justifying the treatment on hygiene

¹² [1994] IRLR 482, ECJ.

¹³ [1996] IRLR 214, ECJ.

¹⁴ The reasoning of the ECJ was followed by the domestic courts in *Clark v. Secretary of State for Employment* [1996] IRLR 578, CA.

¹⁵ [1980] IRLR 64, CA. See also *Singh v Rowntree MacKintosh Ltd* [1979] ICR 554, EAT.

grounds. On the other hand, the courts may accept that an employer's refusal to hire a woman on the ground that she menstruates constitutes direct sex discrimination.

Ill health is another area that has been problematic for the courts. Is it direct discrimination to dismiss a person because he or she has a medical condition that relates to a categorical or unique sex characteristic eg breast cancer or prostate cancer? The illnesses themselves are unique sex characteristics even though they may relate to categorical characteristics. Not all women suffer from cervical cancer despite the fact that all women have a cervix. The approach that the courts seem to have taken is that it is possible to disassociate ill health from its consequences, in particular absence from work. If a woman is dismissed after being absent from work due to a hysterectomy her dismissal is by reason of her absence and not the fact that she has had a hysterectomy. As a result, as long as a man absent from work for a similar period of time would also have been dismissed, the reason for the dismissal is not related to sex.¹⁶ Similarly, it is not directly discriminatory to impose a disciplinary sanction against a woman absent from work due to period pains.¹⁷ The one exception to this rule is pregnancy related illness. In *Hertz v Dansk*¹⁸ the ECJ held that pregnancy related illness cannot be disassociated from the pregnancy itself. As a result, a dismissal or any other detriment imposed because the applicant has a pregnancy related illness amounts to direct discrimination.

There have been no reported cases where an applicant has been dismissed or subjected to a detriment for an illness that is unique to one sex without there being some associated sickness absence. For example, a woman with breast cancer dismissed by an employer solely because of her illness. It is not clear what the courts would do in such a

¹⁶ See for example *Girlington Nursing Home v Bridgeman* EAT, EOR Discrimination Case Law Digest No 29, Autumn 1996, p 5. The Government has adopted a similar position in relation to absence due to gender reassignment. The Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999 No 1102, insert a new s 2A into the SDA 1975 which prohibits less favourable treatment on the ground of gender reassignment. However, the new provision specifically states that in relation to time off for medical treatment, an individual is only treated less favourably if he or she is allowed less time than would be given to a person absent due to illness or some other cause, eg leave to nurse a sick relative. For more information on the Regulations see: EOR No 85, May/June 1999, p 36 and *A guide to the sex discrimination gender reassignment regulations 1999*, Department for Education and Employment, (1999).

¹⁷ *Boyle v Falkirk District Council* IT, EOR Discrimination Case Law Digest No 11, Spring 1992, p 5. See also *Carpenter v Business Link London* EOR Discrimination Case Law Digest, No 40, Summer 1999, p 4, where the tribunal held that dismissal for a reason related to a woman's menopause is not discriminatory.

¹⁸ [1991] IRLR 31, ECJ. Although, this only applies from the beginning of pregnancy until the end of maternity leave. The implications of this decision are discussed in chapter 8.

situation. On the one hand they may decide that as breast cancer is a unique sex difference it gives rise to a claim of direct sex discrimination. On the other hand, the courts may take the view that there is no reason to separate breast cancer from any other illness and, as long as employees with other illnesses are dismissed in similar circumstances, they may find that the dismissal is not on the ground of sex. However, this would still mean that if women with breast cancer are dismissed but men with prostate cancer or employees of either sex with lung cancer are not dismissed, the dismissal of the woman with breast cancer would be on the ground of sex.

The definition of sex is a key issue because it determines the line between direct and indirect discrimination which in turn determines whether an employer will have the option of justifying a particular practice. However, until the courts have had an opportunity to consider some non-pregnancy case it is difficult to predict exactly where the courts will draw the line on unique sex differences. At the moment, all that can be said with any certainty is that sex includes categorical sex differences and, for the purposes of the ETD and the SDA, it also covers the unique sex difference of pregnancy.

DETRIMENTAL TREATMENT

Exactly what constitutes a detriment has been considered in two important appeal court decisions. In *Jeremiah v. Ministry of Defence*¹⁹ the employer operated a factory shop producing colour bursting shells. The work in the shop was dusty and dirty. The employees had to wear protective clothing and had to have a shower at the end of their shift for which they were paid overtime. As compensation for working in dirty conditions they were paid an extra 4p an hour "obnoxious pay". Working in this shop was compulsory for men who volunteered for overtime. No women had to work in the shop even if they volunteered for overtime. The applicant complained that this amounted to discrimination against men.

The CA had no difficulty finding that a requirement to work in the shop amounted to less favourable treatment under s.1(1)(a) of the SDA. Since the complaint was of discrimination in the workplace, the applicant also had to demonstrate the

treatment amounted to a detriment under s. 6(2)(b) of the SDA. The CA held that the particular detriment was that work in the colour bursting shop was less pleasant than in some other shops although there were other shops which were also unpleasant. It made no difference that work in the colour bursting shop attracted an additional payment of 4p an hour.

Lord Justice Brightman held that the correct test is whether a reasonable worker would find the treatment detrimental.

The question before the Tribunal in my view would be whether a reasonable male worker would or might take the view that there was a detriment. ... I think a detriment exists if a reasonable worker would or might take the view that the duty was in all the circumstances to his detriment.

A similar test was applied by the HL in *R v. Birmingham City Council ex parte Equal Opportunities Commission*.²⁰ The respondent council made provision for 540 boys and 369 girls to attend grammar school each year. The CA and the HL upheld the decision of the HC that the girls were being treated less favourably. In the HL Lord Goff said the following about the test for less favourable treatment.

[I]t is not, in my opinion, necessary for the commission to show that selective education is 'better' than non-selective education. It is enough that, by denying the girls the same opportunity as the boys, the council is depriving them of a choice which (as the facts show) is valued by them, or at least by their parents, and which (even though others may take a different view) is a choice obviously valued, on reasonable grounds by many others.

One of the dangers of the reasonable worker approach to detriment is that the courts will consider the issue solely from the male perspective. There are areas where the same treatment is likely to be viewed differently by women and men. For example, sexual harassment is an area where women may have radically different views from men on whether a particular form of treatment is detrimental.²¹ A woman may be deeply

¹⁹ [1979] IRLR 436, CA. See also *Automotive Products Ltd v. Peake* [1977] IRLR 365 where women and men stopped work at the same time but women were allowed to leave the factory five minutes before the men. The CA held that any difference in treatment was de minimus.

²⁰ [1989] IRLR 173. See also *Gill and Coote v. El Vinos Company Ltd* [1983] IRLR 207 in which the CA held that the respondent's policy of banning women drinkers from the bar area amounted to less favourable treatment.

²¹ See the discussion on this issue by Cornell D in *The imaginary domain, abortion, pornography and sexual harassment*, (1995), p 177. However, the courts have not always accepted this point. See, for example, *Stewart v Cleveland Guest (Engineering) Ltd* [1994] IRLR 440, where the EAT upheld the finding of the tribunal that a display of pictures of naked women in the workplace could be as offensive to men as to women. For criticism of the tribunal's approach see 'Pin-ups and sexual harassment', EOR no

upset by a picture of a nude woman on an office wall while a man may be totally unconcerned by the same picture. The danger of the courts viewing detriment from a male perspective is highlighted by Ellis in her analysis of European sex discrimination law. Ellis suggests that a level of objectivity can be achieved by the use of a comparator.²²

It is submitted that an element of comparability is important to the component of adverse impact: if direct discrimination is defined simply as “nasty treatment” on the ground of sex, enormous discretion is placed in the hands of courts and tribunals, who remain overwhelmingly male in composition, to decide what is to the detriment or advantage of complainants, the majority of whom are female. For reasons of objectivity, it is preferable if the adversity of the treatment received by the complainant is measured by means of a comparison with the treatment received by a member of the opposite sex, placed in broadly the same circumstances as the complainant.

The difficulty with this argument is that the use of a comparator does not actually demonstrate that an applicant’s treatment is adverse, merely that it is different from that of the comparator. However, not all different treatment is discriminatory. A rule that women have to wear blue overalls while men have to wear black overalls constitutes a difference in treatment but it is unlikely to be considered a detriment by either party. The use of a comparator does not, therefore, remove the problem of the courts considering detriment from a male perspective. This problem can only be solved by the courts accepting that detriment should be measured on the basis of a reasonable person of the applicant’s sex.²³

Considering detriment from the perspective of a reasonable person of the applicant’s sex does not mean that the test is entirely subjective.²⁴ In *Burrett v. West*

57, September/October 1994, p 24 and McColgan A, ‘Sexual harassment, sex discrimination and unfair dismissal’ (1995) 24 ILJ 181.

²² See Ellis E, above, p 571.

²³ The fact that women and men can have different perspectives on detriment is considered in more detail in the section on dress codes in chapter 8.

²⁴ It seems that sexual harassment cases may be an exception to this rule. In the recent case of *Reed and Bull Information Systems Ltd v Stedman* [1999] IRLR 299, the EAT indicated that: “Because it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what a tribunal would regard as acceptable and what the individual in question was prepared to tolerate.” (para 28) However, this contradicts an earlier finding of the EAT in *Scott v Combined Property Services Ltd* EOR Discrimination Case Law Digest No 32, Summer 1997, p 4, that the test for detriment is both objective and subjective. According to the EAT the tribunal must first ascertain on an objective level whether the behaviour complained of is capable of being offensive. If that test is satisfied the tribunal must then go on to consider on a subjective level whether the applicant was in fact offended. For a discussion of the overlap between sexual harassment and sex discrimination see: Dine J and Watt B,

*Birmingham Health Authority*²⁵ the applicant was a nurse who was required to wear a uniform and a starched linen cap which served no practical purpose. The applicant objected to wearing the cap because she found it to be demeaning. Male nurses were required to wear a different uniform including a white tunic and epaulettes. The EAT rejected the applicant's argument that her honestly held belief that the cap was demeaning was sufficient to demonstrate less favourable treatment.

We are quite unpersuaded that there is any warrant in the terms of the 1975 Act for any such subjective interpretation of its provision that a person discriminates against a woman if on the ground of her sex he treats her less favourably than he treats or would treat a man. There has to be shown less favourable treatment, and the fact that the complainant considers that she or he is being less favourably treated or is being demeaned does not of itself establish that there is less favourable treatment.

Another issue is whether it is possible to consider the overall treatment of an individual or whether it is necessary to consider each element separately. This is a problem that has arisen mainly in the context of equal pay and the various elements of a pay package. For example, is it a detriment to get a lower salary but more holiday if the result is that the hourly rate for the number of hours actually worked is the same? The approach of the domestic courts and the ECJ has been to find that it is necessary to consider each element of the remuneration package separately rather than to see if the overall package is less favourable. Thus, in *Hayward v Cammell Laird Shipbuilders Ltd*²⁶ the applicant was paid lower hourly and overtime rates than her comparator but she received more favourable sickness benefits and meal breaks. The respondent argued that her overall package was no less favourable than that of her comparator. However, the HL rejected this approach and held that the EPA requires a term for term comparison in order to determine whether the applicant has suffered a detriment. The ECJ made the same point in *Barber v Guardian Royal Exchange Assurance Group*²⁷ when it held that in order to ensure transparency and the effective implementation of Article 141 "The application of the principle of equal pay must be ensured in respect of each element of

'Sexual harassment: moving away from discrimination' (1995) 58 MLR 343 and McColgan A, 'Sexual harassment, sex discrimination and unfair dismissal' (1995) 24 ILJ 181.

²⁵ [1994] IRLR 7, EAT.

²⁶ [1988] IRLR 257, HL.

²⁷ [1990] IRLR 240, ECJ.

remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers.”

A slightly different but related question is the extent to which account can be taken of treatment by persons other than the employer. For example, is it a detriment if part of one sex’s income is made up by payments from the state. This issue has arisen a couple of times in cases before the ECJ. The first time was in the context of bridging pensions in the case of *Birds Eye Walls Ltd v Roberts*.²⁸ The difference in treatment arose out of a bridging pension operated by the employer under which employees forced to retire early due to ill health were paid an additional sum to make up the difference between the pension they actually received and the pension they would have received had they continued to work until the state retirement age. From the age of 60 the bridging pension for a woman was reduced by the amount of the state pension. The same reduction was made for a man at the age of 65. Thus, the overall amount received by a man and a woman on an ill-health pension was the same but, in the case of a woman aged between 60 and 65, part of the income was supplied by the state. The ECJ side-stepped the issue of whether there was any discrimination by finding that there was no discrimination for other reasons. However, an alternative approach would have been for the ECJ to find that there was no detriment because the overall level of income (state and occupational package combined) was the same.²⁹

The issue arose for the second time the *Pedersen* case.³⁰ In this case pregnant women absent from work for a pregnancy related illness were not entitled to sick pay but they were entitled to pre-maternity benefits paid by the Danish state. The issue was whether this amounted to direct discrimination under Article 141. The ECJ held that it would be unless the benefits paid by the state were equal to the amount of pay.

Thus, the fact that a woman is deprived, before the beginning of her maternity leave, of her full pay when her incapacity for work is the result of a pathological condition connected with the pregnancy must be regarded as treatment based essentially on the pregnancy and thus as discriminatory.

It would be otherwise only where the sums received by employees by way of benefits were equal to the amount of their pay. If such were the case, it would still be for the national court to ascertain whether the circumstance that the

²⁸ [1994] IRLR 29, ECJ.

²⁹ This case and the issue of whether there was any detriment is considered in more detail in chapter 8.

³⁰ [1999] IRLR 55, ECJ.

benefits are paid by a local authority is such as to bring about discrimination in breach of [Article 141] of the Treaty.

In other words, the ECJ held that there would be no discrimination if the state makes up the applicant's income as long as the way in which the benefit is paid does not disadvantage the applicant. (For example, the applicant might be worse off if there is a long delay before the benefit is paid.) On this basis it would seem that although each element of the package must be considered separately, in relation to an individual element it is possible to take account of any state provision in determining whether the difference in treatment is detrimental.

CAUSATION

In order for direct discrimination to exist, there must be a causal link between the detrimental treatment and the applicant's sex. The exact nature of the requisite causal link was considered by the EAT in *O'Neill v. Governors of St Thomas More RCVA Upper School*.³¹ The case revolved around whether the applicant had been dismissed because she was pregnant or because she was pregnant as a result of a relationship with a Roman Catholic priest. On appeal, the EAT set out the relevant principles for determining causation in discrimination cases.³²

First, the subjective mental processes of the respondent ie its intentions or motives are irrelevant to the question of liability. The correct test is the objective test set out by the HL in *James v. Eastleigh*, ie would the applicant have received the same treatment but for his or her sex?³³ In other words, it makes no difference that the respondent had no conscious desire to disadvantage one sex. For example, a rule that women can leave work five minutes early may be motivated by health and safety considerations. However, it is still a case of direct sex discrimination because there is a causal link between the detrimental treatment of being made to work five minutes longer and the categorical sex difference of being male.³⁴

³¹ [1996] IRLR 372, EAT.

³² These comments were approved by the CA in the case of *Smith v. Gardner Merchant Ltd* [1998] IRLR 510, CA.

³³ [1990] ICR 554, HL.

³⁴ These facts arose in the case of *Automotive Products Ltd v. Peake* [1977] IRLR 365. The CA found that the difference in treatment was de minimus.

Second, it is not necessary that sex is the sole reason for the detrimental treatment as long as it is an effective cause of the treatment. Quoting from the decision of the CA in *Banque Bruxelles v. Eagle Star Insurance Co Ltd*³⁵ the EAT said:

The basic question is: what, out of the whole complex of facts before the tribunal, is the 'effective and predominant' cause or the 'real and efficient cause' of the act complained of? As a matter of common sense not all the factors present in a situation are equally entitled to be treated as a cause of the crucial event for the purpose of attributing legal liability for consequences. ... The approach to causation is further qualified by the principle that the event or factor alleged to be causative of the matter complained of need not be the only or even the main cause of the result complained of (though it must provide more than just the occasion for the result complained of). ... It is enough if it is an effective cause.

The key point here is that sex does not have to be the main cause of the detrimental treatment as long as it is an effective cause. For example, a woman has a long history of unsatisfactory performance at work. She announces that she is pregnant and this is the effective cause of the employer's decision to dismiss although the main reason for the dismissal is her bad work record.³⁶

Finally, in terms of existing law it is not necessary for the causal link to be between the detrimental treatment and the applicant's sex. Section 1(1)(a) of the SDA states that the treatment must be "on the ground of sex", it does not say "on the ground of *her* sex". Similarly, the ETD is not restricted to detrimental ground on the ground of the applicant's sex. As a result, it is possible for A to discriminate against B on the ground of C's sex.³⁷ For example, it would be direct discrimination for an employer to give nursery vouchers to parents with male children but not to parents with female children.

³⁵ [1995] 2 WLR 697, CA.

³⁶ There have been a number of race discrimination cases which have adopted this position: *Owen & Briggs v. James* [1982] IRLR 502, CA; *Nagarajan v. Agnew* [1994] IRLR 61, EAT, *Seide v. Gillette Industries Ltd* [1980] IRLR 427,

³⁷ Although there are no sex discrimination cases on this point, there have been race cases where white applicants have been dismissed for refusing to carrying out an unlawful instruction to discriminate against third parties and the courts have held that a causal connection with the race of the third party is sufficient to establish race discrimination against the applicant: see *Weathersfield Ltd v. Sargent* [1998] IRLR 14, EAT and *Showboat Entertainment Centre Ltd v. Owens* [1984] IRLR 7, EAT.

BURDEN OF PROOF

Article 4(1) of the BPD contains the following provision on the burden of proof in discrimination cases.

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Article 4(1) is based on the existing case law of the ECJ in equal pay cases. In *Enderby v Frenchay Health Authority*³⁸ the ECJ held that where the pay of one group is significantly lower than that of another group and the former group is almost exclusively women and the latter group predominantly men, this raises a prima facie case of sex discrimination. The burden of proof then shifts to the employer to demonstrate that there is no discriminatory reason (direct or indirect) for the difference in pay.³⁹ Under the EPA, once the applicant has established that he or she is employed on equal work and that there is a difference in pay, the burden is on the employer to prove that the difference in pay is due to a material factor which is not the difference in sex (s 1(3)).⁴⁰ Thus, the provisions of the EPA are already more favourable to the applicant than the provisions of the BPD. The same cannot be said of the SDA. Under the SDA the burden is on the applicant to prove unlawful discrimination.⁴¹ Although, the courts have held that if the applicant can show a difference in treatment and a difference in sex, the tribunal may look to the employer for an explanation. If that explanation is unsatisfactory, the tribunal may infer that the difference in treatment is on the ground of sex.⁴² The BPD goes further than this as it states that if an applicant establishes facts

³⁸ [1994] 1 CMLR 8, ECJ.

³⁹ See also *Specialarbejderforbundet i Danmark v. Dansk Industri* [1995] IRLR 648, ECJ.

⁴⁰ See also the decision of the EAT in *The Financial Times v Byrne* [1992] IRLR 163.

⁴¹ *Oxford v Department of Health and Social Security* [1997] IRLR 225, EAT.

⁴² Most of the cases on the burden of proof have arisen in the context of race discrimination: see for example, *King v The Great Britain China Centre* [1991] IRLR 513, CA and *Noone v North West Regional Health Authority* [1988] IRLR 195, Court of Appeal. However, the same principles have also been applied to sex discrimination: see *Wallace v South Eastern Education and Library Board* [1980] IRLR 193, NICA. On problems of proof generally see: Lustgarten L, 'Problems of proof in employment discrimination cases' (1977) 6 ILJ 212 and Bindman G, 'Proof and evidence of discrimination' in Hepple B and Szyszczak E eds, *Discrimination: the limits of the law*, chp 4. (1992).

from which it can be presumed that direct or indirect discrimination has occurred, the burden shifts to the employer to prove that there has been no discrimination. It is not clear what an applicant has to prove in order to raise a presumption of discrimination. However, in the light of the *Enderby* decision it may well be sufficient for the applicant to prove a difference in treatment together with a difference in sex in order to raise a presumption of direct discrimination. It will then be for the employer to prove that there is a non discriminatory reason for the difference in treatment.

CONCLUSION

This chapter looks at the three constituent elements that make up a claim of direct sex discrimination namely sex, detrimental treatment and causation. Of the three elements causation is the most straightforward and presents no particular problems. With regard to detriment, two issues are highlighted. First, determining detriment on the basis of the views of the reasonable worker has the danger that the courts will consider the issue solely from the male perspective. In order to avoid this problem detriment needs to be viewed from the perspective of a reasonable person of the applicant's sex. Second, it is not clear whether account can be taken of treatment by persons other than the employer. This is important because it affects the extent to which employers can take advantage of benefits paid by the state eg maternity benefits in determining whether one sex has been treated detrimentally. Perhaps the most problematic of the three elements is the definition of sex and the extent to which it includes unique sex differences. The position appears to be that some unique sex differences eg pregnancy and maternity are covered by the definition of sex while others are not with the result that unique differences are split between direct and indirect discrimination.

STEREOTYPES

INTRODUCTION

There is a second and entirely discrete form of direct discrimination that involves the use of sexual stereotypes. In the leading case of *Skyrail Oceanic Ltd v Coleman*¹ the CA accepted that to dismiss a woman because of an assumption that men are more likely than women to be the primary breadwinner can amount to discrimination under s 1 of the SDA. The EAT subsequently confirmed that the definition of direct discrimination in the SDA covers all cases where the reason for the detrimental treatment is a generalised assumption that people of a particular sex possess or lack certain characteristics.² Although there have been no reported cases involving stereotypes under the EPA or European law, there is no reason to assume that the situation is any different. Thus, it is not open to an employer to defend an equal pay claim on the basis that women in general are less reliable than men. The situation, therefore, is that the use of sexual stereotypes or generalisations is *always* unlawful if it results in detriment to the applicant. (There is one exception which is that employers can rely on generalised assumptions about the life expectancy of women and men in the context of occupational pension benefits. This exception is considered in more detail in chapter 4.) This chapter considers stereotypes from the perspective of social psychology. It examines the cognitive processes involved in stereotyping, the origins and accuracy of stereotypes and the extent to which they influence decisions about individuals.³ The chapter concludes by asking whether the blanket prohibition on the use of sex stereotypes is indeed warranted and, if it is not, the circumstances in which employers should be allowed to rely on them.

¹ [1981] ICR 864, CA.

² *Horse v Dyfed County Council* [1982] ICR 755, EAT.

³ For a general overview of this subject see: Allport G, *The Nature of Prejudice*, (1958); Brown R, *Prejudice - Its Social Psychology*, (1995); Augoustinos M and Walker I, *Social Cognition: An Intergrated Introduction*, (1995); Oakes P, Haslam S and Turner J, *Stereotyping and Social Reality*, (1994); Lee Y-T, Jussim L and McCauley C eds, *Stereotype accuracy: toward appreciating stereotype accuracy*, (1995) and Ehrlich H, *The Social Psychology of Prejudice*, (1973).

DEFINING STEREOTYPES

A stereotype is a generalisation about a group of people or objects and stereotyping can be defined as "the process of ascribing characteristics to people on the basis of their group membership."⁴ A stereotype does not have to be either false or negative. The idea that men tend to be heavier than women is still a stereotype despite its lack of negative connotations or its veracity.⁵ It is important to realise that stereotyping is not synonymous with prejudice. Prejudice is usually defined as a negative and false generalisation. Allport uses the following definition of ethnic prejudice: "Ethnic prejudice is an antipathy based upon a faulty and inflexible generalisation. It may be felt or expressed. It may be directed towards a group as a whole, or towards an individual because he is a member of that group."⁶ More recently, Brown has questioned whether a generalisation needs to be false in order to be prejudicial. He defines prejudice as "the holding of derogatory social attitudes or cognitive beliefs, the expression of negative affect or the display of hostile or discriminatory behaviour towards members of a group on account of their membership of that group."⁷

Stereotyping can be broken down into two elements: the delineation of a category or group and the attribution of characteristics on the basis of group membership. Thus, a remark along the line of "Germans are" involves the mental creation of the category Germans. This category is then used to infer characteristics about individuals in the group.⁸ These two elements of the stereotyping process are considered in detail below together with some of the effects of categorisation.

Categorisation

Category creation is dependent upon two factors. The first and more significant factor is the purpose of the perceiver. As the purpose of the perceiver varies so will the category

⁴ Oakes P et al, above, p1. Although they are often shared by other members of a group, a generalisation held by just one member group is still a stereotype. For example, a person may hold the view that bananas are pink. Even if no other person shares this view it is still a stereotype (albeit an inaccurate one) of bananas.

⁵ Lee Y-T, above, p 7.

⁶ Allport G, above, p 10.

⁷ Brown R, above, p 8. Brown refrains from defining prejudice in terms of falseness because he is concerned that in most cases there is no standard by which to measure the correctness of a belief. The extent to which it is possible to measure the correctness of a stereotype is considered below.

selection. For example, a school teacher may group a class of pupils on the basis of mathematical ability for maths class, athletic ability for games and vocal range for choir practice. The second factor that affects category selection is the actual differences between the stimuli being perceived. While it may be sensible for a maths teacher to group a class on the basis of mathematical ability, if the class are all of comparable ability the selection criterion will not be effective. In this case the teacher must find a criterion that effectively divides the class into the number of groups required. In the absence of a meaningful criterion the teacher may adopt any criterion that matches the actual differences between the children in the class and which is readily accessible.⁹

Although there are an infinite number of criteria by which stimuli can be categorised, it seems that some criteria are more basic than others. In particular, it has been suggested that “social perception is strongly influenced by *generic categories* such as gender, race and age which are activated more or less automatically at the beginning of the impression formation process.”¹⁰ For example, there have been numerous studies in which children as young as five have been asked to sort a pile of photographs. Potentially, the children could sort the photographs on the basis of a number of criteria such as dress style, hair colour, age, height, sex and gender. The results show ethnicity as the most popular selection criterion with gender being the next most popular. In addition, local circumstances may make certain criteria particularly important. For example, religion is much more likely to feature as a relevant category in Northern Ireland than in the south of England.

There are two conflicting theories about why categorisation takes place.¹¹ The first, which has been dubbed 'the cognitive miser approach', is that it is a mechanism for dealing with information overload.¹² The human brain can only deal with so much information at any one time. However, it is constantly being besieged by innumerable stimuli. In order to cope with this situation the brain uses a system of classification in order to reduce the stimuli to a manageable number. As Brown explains:

⁸ Brown, above, p 40.

⁹ Accessible in this context means ease of bringing to mind rather than practicability. Thus, if the teacher had just brought a new pair of shoes, shoe size might be a criterion that would readily come to mind despite the fact that it might not be very practical if it would first involve the teacher in ascertaining the size of each child's feet.

¹⁰ Oakes P et al, above, p 53.

¹¹ Another possibility is that both theories are correct and categorisation has a dual cognitive function.

... the world is simply too complex a place for us to be able to survive without some means of simplifying and ordering it first. Just as biologists and chemists use classification systems to reduce nature's complexity to a more manageable number of categories linked together in scientifically useful ways, so too do we rely on systems of categories in our everyday lives. We simply do not have the capability to respond differently to every single person or event that we encounter. Moreover, even if we did have that capacity, it would be highly dysfunctional to do so because such stimuli possess many characteristics in common with each other, as well as attributes which distinguish them from other stimuli.¹³

In other words, in order to reduce the amount of information flowing through the brain people are perceived on the basis of their social category rather than as individuals.¹⁴

The alternative theory is that categorisation arises because of a deficit of information. The proponents of this theory argue that it would be dysfunctional for people to react to every stimulus as if they had never seen a similar object before. They suggest that the problem lies not in the limited capacity of the brain to process information but in the practical difficulties of obtaining the information. The purpose of categories is to facilitate the drawing of inferences. As Pinker explains:

Obviously we can't know everything about every object. But we can observe some of its properties, assign it to a category, and from the category predict properties that we have not observed. If Mopsy has long ears, he is a rabbit; if he is a rabbit, he should eat carrots, go hippety-hop, and breed like, well, a rabbit.¹⁵

Thus, categories allow people to draw inferences and assign properties to people and objects without the need for further investigation. This explanation sees the tendency to categorise as something beneficial rather than as a defect in the cognitive process. By putting things into categories individuals are able to access more information than they would do otherwise thereby improving the quality of their decision making.

So far, no researcher has devised an experiment that establishes which is the

¹² Oakes P et al, above, p 38.

¹³ Brown R, above, p 41.

¹⁴ The cognitive miser approach does not imply that the human mind is inflexible. Billig likens the process of categorisation to decision making in a bureaucracy. The popular image of a bureaucrat is of a faceless official mindlessly filling in forms and applying the rules. However, as Billig points out, even bureaucratic thinking involves occasions when the bureaucrat has to make out a special case. "Because the procedures cannot specify in advance every small detail about every case, the bureaucrats must be left a certain amount of latitude. As a result the bureaucrats will themselves be defining the procedures in practice, thus building up not only a knowledge of the rules themselves, but a knowledge about how to bend the rules to create a special case." See Billig M, 'Prejudice, categorisation and particularisation: from a perceptual to a rhetorical approach' (1985) 15 *European Journal of Social Psychology*, 79 at p 89.

¹⁵ Pinker S, *How the mind works*, (1997) p 307.

correct explanation. There is some evidence that people are more likely to use categories if their mind is distracted on other tasks. This would tend to imply that categorisation is a mechanism for dealing with information overload rather than a deficit of information.¹⁶ However, other experiments show that there is mixed support for the hypothesis that mental busyness increases the use of stereotypes. In some cases stereotyping has been more prevalent in non-busy conditions.¹⁷ For the present at least, the question of whether categorisation is a result of information overload or a deficit of information remains unresolved.

The effects of categorisation

Categorisation affects the way in which people behave in a number of respects. Perhaps the most important of these is a tendency towards in-group bias. For most people the smallest and most important in-group is the family. People have what the philosopher Spinoza described as a "love-prejudice" or bias towards members of their own family.¹⁸ What is more surprising is that "virtually any basis for categorisation can lay the foundations for in-group favouritism".¹⁹ This seems to be the case even when the categories or in-group are determined by something as mundane as the toss of a coin and the members of the group are unknown to one another.

In order to test this hypothesis Tajfel et al devised a number of experiments using the Minimal Group Paradigm.²⁰ In these experiments the groups are devoid of any human interaction. The members of the group are selected in a random fashion, such as the toss of a coin or their preference for a particular painting. The subjects have no idea who else is in their group or any other group. Subjects are then asked to allocate a fixed sum of money to various pairs of people who are identified only by their number and group, eg member 24 of group A and member 37 of group B.

The experiment is devised in such a way that it is not possible to give equal amounts of money to each person. The subject is faced with three options. First, give each recipient as far as possible the same amount. Second, allocate the money randomly.

¹⁶ Brown R, above, p 103.

¹⁷ Oakes P et al, above, p 66.

¹⁸ Allport G, above, p 24.

¹⁹ Oakes P et al, above, p 43.

²⁰ These experiments are summarised in Oakes P et al, above, p 41 and Brown R, above, p 45.

Third, show a preference to one group over another. A number of experiments using the Minimal Group Paradigm have consistently demonstrated a pattern of distribution that involves an element of fairness combined with a reliable preference towards the in-group. Surprisingly, in one experiment the researchers found that subjects were willing to sacrifice maximum in-group gain in order to achieve relative in-group gain.²¹

It seems, therefore, that one effect of categorisation is for people to have a bias in favour of other people in the same group. The flip side of the coin is a bias against members of an out-group. This does not mean that people necessarily have any intense feelings against the members of an out-group. But, if people are asked to make a decision that involves allocating a benefit between an in-group member and an out-group member, in the absence of any other motivation, people have a natural tendency to act in a way that favours the in-group member and disadvantages the out-group member.²²

As indicated above, stereotyping is a two stage process involving the formation of categories followed by the application of characteristics on the basis of category membership. However, it is possible that the tendency towards in-group bias gives rise to a separate form of direct discrimination that does not involve the second element traditionally associated with stereotyping, the application of category characteristics. In other words, an individual may treat another person detrimentally solely on the basis of category membership and not because of any characteristics generally associated with the group. For example, a male manager refuses to appoint a female employee because he perceives women as the out-group. As tribunals do not use the terminology of in-groups and out-groups it is not possible to tell from the decisions whether, in any particular case, this is the basis for the respondent's behaviour as opposed to the application of a more traditional stereotype. A common theme in sex discrimination cases and one that often rings alarm bells with tribunals is a view on the part of the employer that an employee of

²¹ Oakes P et al, above, p42.

²² A number of explanations have been put forward to explain in-group bias. One possibility is that it derives from inter group conflict. The main proponent of this theory is Sherif who conducted a number of famous experiments known as the 'summer camp studies'. The results of these studies are summarised in Brown R, above, p 164. A second explanation for in-group bias is social identity theory. This theory assumes that people are motivated to evaluate themselves positively, and thus insofar as they identify themselves with a group, they will be motivated to evaluate the in-group positively in relation to out-groups: see Oakes P et al, above, p 82 and Allport G, above, p 45.

a particular sex would “fit in” better with the organisation.²³ The concept of “fitting in” may indicate one of two things. It could reflect a generalised assumption that the particular characteristics necessary for the successful accomplishment of the job are only held by one sex. Alternatively, it could indicate a preference for the members of the in-group and a bias against the members of the out-group. There is clearly no rational use for in-group bias in an employment situation. It is entirely irrational for an employer to refuse to hire a woman solely because she is a member of the out-group. As a result, there would appear to be no basis for allowing this particular form of direct sex discrimination.

A second effect of categorisation is a tendency to enhance the differences between groups. This effect has been demonstrated in relation to physical stimuli in a famous experiment by Tajfel and Wilkes.²⁴ The experiment involved eight lines printed on cardboard increasing in length by one centimetre each. Subjects were asked to estimate the length of each line. Subjects in the control group were able to estimate the lengths of the lines quite accurately. The four shorter lines were then labelled 'A' and the four longer lines labelled 'B'. Subjects in the experimental group continued to estimate the lengths of the three shortest and three longest lines quite accurately. The one variation comes with the estimates of the longest 'A' line and the shortest 'B' line. Subjects consistently perceived the difference to be twice its actual size, ie two centimetres. In a human situation this effect is likely to mean that in-group members think that they are more different from the out-group than they really are. For example, the English think that they are more different from the Scots than they really are and women think that they are more different from men than they really are.

A third, but less than universal effect, is perceived out-group homogeneity or a tendency to think that out-group members are more similar than they actually are. The idea that “they all look alike” is an example of this tendency.²⁵ For example, one study investigated how White residents of an American neighbourhood perceived White and Black families moving into the area. The results showed that the Black families were

²³ See for example *Taylor v Freemans Mail Order* EOR Discrimination Case Law Digest No 27, Spring 1996, p 8 and *Marrington v University of Sunderland* EOR Discrimination Case Law Digest No 27, Autumn 1995, p 7.

²⁴ The results of the experiment are summarised in Brown R, above, p 43.

²⁵ Oakes P et al, above, p 161.

more categorised than White families and that White families were more individually perceived. In another experiment members of university clubs rated members of their own club as having a greater variety of personality traits than members of other clubs.²⁶ However, in certain contexts, in-groups display greater homogeneity than out-groups. In particular, minority groups appear to perceive themselves as more similar than the out-group. This has been found to be the case both with ethnic minorities and with women academic staff in an environment where women were outnumbered by men by a ratio of 8:1. Similarly, another study found that homosexual men consider themselves to be more similar than heterosexual men.²⁷ Both the tendency to enhance the differences between groups and the perception of out-group homogeneity can have an impact on the accuracy of stereotypes which in turn has an impact on their rational use. The issue of stereotype accuracy is discussed in more detail below.

THE APPLICATION OF STEREOTYPICAL CHARACTERISTICS

The second element of stereotyping involves the application of characteristics on the basis of group membership. How do certain characteristics become associated with particular groups? There are two main theories that explain the origins of stereotypical characteristics. The first is that they reflect the existing social arrangements and actual differences between people. For example, the stereotype that men are taller than women derives from the fact that men are generally taller than women.²⁸ This is not to say that all stereotypes are accurate representations of groups. However, many psychologists would accept that there is at least 'a kernel of truth' in many stereotypes.

A study by Eagly and Wood investigated whether the popular belief that men exert influence more easily than women stems from two factors (i) the fact that women tend to occupy lower status positions than men and (ii) the belief that ability to influence is linked to status.²⁹ The subjects of the experiment read a scenario in which an employee of one sex attempted to influence an employee of the other sex. In some cases

²⁶ Brown R, above, p 55.

²⁷ Brown R, above, p 57; Lee Y-T et al, above, p 12.

²⁸ Men are on average 7% taller and 20% heavier than women. Nicholson J, *Men and women: How are they different?*, (1984), p 42.

the job titles of the communicator and recipient were omitted. In other cases job titles were included and the status of the job title varied. Subjects were asked to predict the reaction of the recipient. For the scenarios that omitted job titles the researchers found that compliance was perceived as being more likely when the communicator was male and the recipient was female. In contrast, when job titles were indicated subjects did not use sex as a basis for predicting influence. The researchers concluded from this that one source for the gender stereotype that men exert influence more easily than women is the fact that more men than women occupy high status roles.

In a later study Eagly and Steffen investigated the extent to which the belief that women are more communal (selfless and concerned with others) and less agentic (self-assertive and motivated to master) than men can be attributed to the differing distributions of women and men into the roles of homemaker and employee.³⁰ Each subject was asked to read a short description of a stimulus person. The person was described as being male or female and either a homemaker, employed or no occupational description was given. Where no occupational description was given subjects were asked to infer whether the stimulus person was employed or not. Subjects were also asked to predict the salary of the stimulus person. The researchers found that regardless of their sex, homemakers were perceived as more communal than employees. Where no occupation was specified, women were perceived as more communal than men. The female and male employees were not perceived to differ in communion, nor were the female and male homemakers. Employees were perceived as more agentic than homemakers, regardless of sex. For persons with no occupation, men were perceived as more agentic than women. The researchers described their findings as: "generally favourable to the hypothesis that a sex difference in the distribution of women and men into homemaker and employee roles underlies the stereotype that women are communal and men are agentic."³¹ The researchers also found that working women were perceived as being more agentic than working men. The results of an additional experiment produced evidence in favour of the hypothesis that this was a result of the subjects'

²⁹ Eagly A and Wood W, 'Inferred sex differences in status as a determinant of gender stereotypes about social influence' (1982) 43 *Journal of Personality and Social Psychology* 915.

³⁰ Eagly A and Steffen V, 'Gender stereotypes stem from the distribution of women and men into social roles' (1984) 46 *Journal of Personality and Social Psychology* 735.

³¹ Eagly A and Steffen V, above, p 743.

perception that women are more likely than men to have chosen to be employed.

A second possible explanation for the origins of stereotypical characteristics is that they are used to justify the existing social arrangements. As Jost and Banaji explain:³²

System-justification is the psychological process by which existing social arrangements are legitimised, even at the expense of personal and group interests. ...stereotypes emerge and are used to explain some existing state of affairs, such as social or economic systems, status or power hierarchies, distribution of resources, divisions of social roles, and the like....

In other words, stereotypes have a function in maintaining the status-quo even though this may have negative consequences for the individual and be detrimental to self esteem.³³

Hoffman and Hurst looked at the extent to which stereotypes are used to rationalise, justify and explain the division of labour.³⁴

The differential participation by women and men in the roles of homemaker and breadwinner (as well as a few other key roles such as soldier) is a social fact of such pervasive significance that it would be very odd indeed if cultures and individuals did not feel some need to explain or rationalise that fact. And the most powerful rationale imaginable is probably the simple assumption that there are inherent differences between males and females that make each sex better suited for its role – that each sex has, in other words, a greater capacity for the qualities thought to be necessary to the performance of its traditional function.

In order to test this hypothesis, subjects were given written information about two fictional groups of intelligent life on another planet, the Orinthians and Ackmians. Subjects were told that there were no male or female sexes on the planet and that any individual could mate with any other individual. Subjects were also told that the adults in both groups contained child raisers and city workers. Subjects were then given a brief description of 15 Orinthians and 15 Ackmians. Each description contained the name of the stimulus person, the person's category, ie Orinthian or Ackmian and three personality traits (eg Damorian, an Orinthian who works in the city, is resourceful, individualistic and soft-spoken). The traits were selected as being agentic, communal or neutral. Each

³² Jost J and Banaji M, 'The role of stereotyping in system-justification and the production of false consciousness' (1994) 33 British Journal of Social Psychology 1.

³³ This argument is consistent with the body of social psychological research which finds that people are very resistant to change and tend to imbue the existing system with an 'ought' quality. Jost J and Banaji M, above, p 10.

³⁴ Hoffman C and Hurst N, 'Gender stereotypes: perception or rationalisation?' (1990) 58 Journal of Personality and Social Psychology 197.

description contained one agentic, one communal and one neutral trait. The result being that there was no correlation between the personalities of the targets, social role and categorisation.

Subjects were asked to provide a possible explanation for the role distribution. Almost three-quarters attributed the distribution to differences in personality between the two categories of child raisers and city workers. The researchers concluded that: "the responses clearly confirmed our expectation that the preferred explanation for the role distribution would be simply that each category's personality causes it to be well suited to its predominant role."³⁵

One of the reasons why stereotypes are so enduring is the tendency of individuals to ignore information that contradicts an existing stereotype. For example, a woman has a stereotype that Germans are efficient. An encounter with just one inefficient postal clerk is unlikely to have any impact on her view of Germans because she knows that the stereotype is only a generalisation and, therefore, there are bound to be exceptions. However, even if she meets several inefficient postal clerks her stereotype of Germans is unlikely to change. She is more likely to re-define the stereotype in order to exclude postal clerks. This phenomena is known as refencing a stereotype. However, there are two instances when this is unlikely to happen. First, some people are habitually open minded and will readily adjust their stereotypes and second, when changing a category is in an individual's self-interest. If a person has a stereotype that Rome is a safe city to visit and hears that a tourist has been murdered in Rome, the person may change his or her view and conclude that Rome is no longer a safe city.³⁶

STEREOTYPES AS SELF-FULFILLING PROPHECIES

There are two ways in which stereotypes can become self-fulfilling prophecies. First, by people seeking self-confirming evidence. Second, by the effect of the stereotype on the person being perceived. In relation to the first way, there is some evidence that

³⁵ Hoffman C and Hurst N, above, p 202. The researchers were concerned that subjects may have equated the two categories with human sexes. They therefore asked each subject to guess the real purpose of the study. Only 12% of the subjects made any reference whatsoever to gender. Thus, most people were unaware that the study related to gender.

³⁶ Allport G, above, p 23; Brown R, above, p 113.

individuals have a tendency to select information that will confirm their expectancies. This was demonstrated in a study using the 'ambiguous shove'.³⁷ The researcher prepared a number of video tapes showing a heated argument which culminated in one man shoving the other. The tapes were similar save that the race (Black/White) of the perpetrator and victim were changed. Subjects were asked to watch the tape and interpret what had happened. The results are summarised by Brown.

In the versions with the Black perpetrator over 90 per cent of the subjects judged the action to be 'violent' or 'aggressive' and tended to attribute it to some internal cause; in the White perpetrator versions less than 40 per cent coded it as violent or aggressive and were more inclined to believe in some situational cause for the action.

Another study showed a similar result in an interview situation.³⁸ Interviewers were told that the candidates they were about to interview were either introverts or extroverts. The interviewers were given a list of questions to select from during the interview. The researchers found that when interviewing ostensibly extrovert candidates the interviewers selected questions which were more likely to reveal extrovert tendencies. For example, the interviewers would select questions such as "What would you do if you wanted to liven things up at a party?" Similarly, with ostensibly introvert candidates the interviewers would select introvert questions such as "What factors make it hard for you to really open up to people?" In other words, the interviewers were actively seeking information that would confirm their pre-existing conceptions.

The second way in which stereotypes can become self-fulfilling is by their effect on the person being perceived. Individuals tend to react to other peoples perceptions of themselves. Thus, if a woman is speaking to someone whom she suspects is antagonistic towards her, her language, tone of voice and body language are likely to come across as being hostile. This, in turn, is likely to cause the person to whom she is speaking to adopt a hostile attitude towards her, thereby confirming her initial perception of antagonism.

A number of experiments have looked at this phenomena in an interview situation. A study by Word et al looked at the effect of colour on interviewers.³⁹ A group of interviewees, half Black and half White were trained to react in a standardised

³⁷ The results of this study are summarised in Oakes P et al, p 58 and in Brown R. above, p 100.

³⁸ The results of this study are summarised in Brown R, above, p 94 and Oakes P et al, above, p 59.

way. White subjects were asked to role play the position of interviewer. Observation of the interviewers' behaviour showed subtle differences in behaviour with Black and White interviewees. The interviewers tended to sit further away from the Black interviewees and to lean further back in their seats, the interviews were on average 25 per cent (or three minutes) shorter and contained more speech disfluencies (for example, stuttering, hesitations). A second experiment looked at the effect of these differences on the performance of the interviewees. The researchers found that the interviewees' behaviour seemed to reciprocate that of the interviewers. For example, if the interviewer adopted a friendly attitude and spoke fluently the interviewees behaved similarly. This, in turn, affected the interviewers' assessment of the interviewees' suitability for appointment.⁴⁰

THE VERACITY AND RATIONALITY OF STEREOTYPES

One of the main problems with measuring the veracity of a stereotype is finding an objective standard against which the stereotype can be judged. For example, height can be measured in centimetres, weight can be measured in kilos and speed can be measured in distance travelled in a given time. However, many stereotypes relate to characteristics that can only be measured subjectively eg physical attractiveness or frugality. Conceptions of beauty differ from person to person as well as between cultures and over time. What is perceived as being thrifty in one culture may be perceived as being stingy in another culture. Moreover, characteristics change depending on whom the comparison is made with. The English may be described as thrifty when compared with Italians but profligate when compared with the Scottish.

Leaving these problems aside, there are two points that can be made about subjective characteristics. First, it may be possible to identify objective criteria that are evidence of the subjective criteria. For example, it may be rational to make a link between being thrifty (subjective characteristic) and the saving to spending ratio of a particular group (objective characteristic). If there are two groups of people with approximately the same average income and it is known that group A saves

³⁹ The results of this study are summarised in Brown R, above, p 106.

⁴⁰ There have been a number of studies which have looked at whether academic performance is affected by teacher expectation: see Brown R, above, p 107 and Lee Y-T et al, above, p 248.

proportionately more than group B it would be reasonable to conclude from this information that group A is thriftier than group B. In this way, while it may not be possible to directly measure the accuracy of a particular stereotype there may be evidence which supports it one way or the other. Second, some characteristics are generally accepted as being inherently subjective but this does not detract from their usefulness in some contexts. If the readers of a magazine vote a particular model as the most beautiful woman in the world the fact that this assessment is subjective may be immaterial to the marketing director of a perfume company. What is important to the director is that a significant percentage of the population consider the model to be attractive.

Another problem that arises in relation to measuring the accuracy of stereotypes is that in some circumstances people apply different standards to different groups. For example, a 5 ft, 9 in man may be perceived as being average while a 5 ft, 9 in woman is perceived as being tall despite the fact that they are objectively the same height. Similarly, people may apply shifting standards when measuring attributes such as verbal ability, competence and aggression in men and women. Thus the stereotype that men are more aggressive than women might mean that on any objective standard a man rated as "very aggressive" is actually more aggressive than a woman rated as "very aggressive".⁴¹ In practice, this phenomena means that when people are judged on an impressionistic basis there is a danger that different standards will be used. For example, if a selection board is asked to judge a candidate's level of confidence on the basis of his or her performance at interview there is a possibility that a woman rated as very confident may actually be no more confident than a man judged to be average.

⁴¹ The use of subjective standards can obscure the use of stereotypes. Biernat demonstrated this in an experiment using a number of full-body photos of men and women. Unknown to the subjects the photos were matched so that for every man there was a woman of the same height. Some of the subjects were asked to judge height in feet and inches (objective condition) and others were asked to judge height on the basis of a seven point response scale ranging from short to tall (subjective condition). The subjects judging on the basis of the objective condition of feet and inches showed a greater tendency to over predict the height of the men than the subject using the subject condition. In other words, the use of the subjective standard of measurement tended to obscure the subjects use of the stereotype that men are taller than women. Biernat found similar results with skills such as competence. For example, subjects were asked to judge an article for competence. The author of the article was changed from male to female. Subjects judging the article on an objective standard of measurement revealed a greater reliance on the stereotype that men are more competent than women than the subjects judging on a subjective standard: Biernat M, 'The shifting standards model: implications of stereotype accuracy for social judgment' in Lee Y-T, Jussim L and McCauley C eds, *Stereotype accuracy: toward appreciating group differences*, chp 4, (1995).

There is no evidence that people think stereotypes are 100% true.⁴² Although a person may say, "Blacks are athletic," when asked if this is a characteristic of all Black people the answer will inevitably be no. People clearly understand that stereotypes are generalisations and as such, they do not apply to every member of a group. Even if a stereotype is not 100% accurate it can still be rational if it has a reasonable probability of predicting an event happening.⁴³ Scientific laws are examples of rational categories. For example, a person can rely on Newton's second law of motion to predict that the force exerted by an object is equal to its mass multiplied by its acceleration. In the absence of any information other than sex, a person can rationally predict that a woman will live longer than a man and that a man will be heavier and taller than a woman. However, it would be less rational to predict that a man is corrupt because he is a politician or that a woman comes from Essex because she is called Sharon. The key issue is not whether a stereotype is 100% accurate but whether group membership is a reasonable basis for predicting that an individual member of the group has a particular characteristic.

It is often assumed that many stereotypes are exaggerations of real differences. McCauley has reviewed some of the more significant studies that provide evidence for and against the exaggeration hypothesis.⁴⁴ The main difficulty with testing the exaggeration hypothesis is obtaining accurate figures for group differences against which stereotypes can be measured. For example, one study that McCauley reviews examines whether people tend to exaggerate the differences between male and female personality traits.⁴⁵ The subjects were asked to estimate the percentage of male and female university students having each of 16 male and 16 female personality traits. The 'actual' distribution of these traits was obtained by asking the same students whether each of the 32 traits was true of themselves. The study found that the students made substantial errors in estimating personality traits but the tendency to exaggerate was not strong. However, as McCauley points out, the researchers' method for ascertaining actual differences was not necessarily reliable. Many of the personality traits were value laden

⁴² Jussim L, Lee Y-T and McCauley C, 'Why study stereotype accuracy and inaccuracy' in Lee Y-T, Jussim L and McCauley C eds, *Stereotype accuracy: toward appreciating group differences*, chp 1, (1995).

⁴³ Allport G, above, p 21.

⁴⁴ McCauley C, 'Are stereotypes exaggerated? A sampling of racial, gender, academic, occupational and political stereotypes' in Lee Y-T et al, above, chp 9.

⁴⁵ McCauley C, above, p 223.

and many people would prefer not to admit that they have negative personality traits such as being aggressive or lack positive personality traits like being warm. It is possible, therefore, that the subjects were accurate in their estimations and that any error lay with the subjects perceptions of their own attributes.

McCauley himself conducted a study that used the American census statistics in order to measure the degree of exaggeration. Five groups of White subjects were asked to estimate the percentage of Black Americans and the percentage of all Americans with seven characteristics. Percentages for each characteristic were available from the American census. The results of the study are set out below.

Criterion differences and mean estimated differences
between Black Americans and all Americans

Characteristic	Criterion	High School	College	Union	Choir	MSW students
n		10	17	12	10	13
1. completed high school	-21	-22	-18	-18	-23	-22
2. illegitimate	23	14	5 ^a	12 ^a	16	10 ^a
3. unemployed last month	7	9	5	9	16	7
4. victim of violent crime	2	-5	6	7	7	8
5. family on welfare	18	22	8 ^a	6 ^a	15	6 ^a
6. family with 4+ children	7	13	6	9	7	7
7. female head of family	21	10 ^a	11 ^a	8 ^a	8 ^a	12

Note: Criterion is data from U.S. census. MSW = master of social work
^a Mean estimated difference differs from criterion difference by 10 or more percentage points

The second column of the table shows the difference in the percentage of Blacks and all Americans according to the United States census, ie the percentage of Blacks minus the percentage of all Americans. In the case of the criterion completed high school, 60% of all Americans completed high school compared with 39% of Black Americans. The difference between the two is therefore -21 percentage points. With the criterion illegitimate, 11% of all Americans are illegitimate compared with 34% of Black

Americans. The difference between the two is therefore 23 percentage points.⁴⁶ Of the 35 comparisons, only ten (marked with a superscript a) departed from the census figures by ten or more percentage points. All ten were underestimates rather than exaggerations. Three out of the five groups of subjects underestimated the percentage of Black American families on welfare, three groups underestimated the percentage of illegitimate Black Americans and four out of the five groups underestimated the percentage of Black American families with a female head. Overall, the results show considerable accuracy in the subjects' ability to predict the differences between all Americans and Black Americans.⁴⁷

A recent study by Jussim and Eccles looked at the accuracy of teachers' perceptions of sex, class or ethnic differences in student performance.⁴⁸ The study found that teachers perceived girls as performing slightly better than boys and middle-class students as performing slightly better than lower-class students. The results on ethnicity were mixed. In segregated districts teachers perceived no differences between Black and White students. In integrated districts they evaluated White students more highly. The study also found that for the most part the teachers' perceptions were accurate. The one exception to this pattern was for ethnicity in the segregated areas. Teachers perceived Black students as favourably as other students when in fact their test scores were not as high. It seems therefore, that there is insufficient evidence of a large and consistent exaggeration effect in group stereotyping. The studies show that while significant exaggeration does occur, so does under estimation of group differences.

STEREOTYPES VERSUS INDIVIDUATING INFORMATION

Despite the fact that it is irrational to do so, some studies have shown that people rely on stereotypes even when information is available about an individual.⁴⁹ In one study a number of business managers were asked to comment on the likelihood of inviting a

⁴⁶ The actual percentage points are given in a table in McCauley C, above, p 229.

⁴⁷ See also Pinker S, above, p 313 who states: "Ordinary people's estimates of these differences are fairly accurate, and in some cases, people with more contact with a minority group, such as social workers, have more pessimistic, and unfortunately more accurate, estimates of the frequency of negative traits such as illegitimacy and welfare dependency."

⁴⁸ Lee Y-T et al, above, p 249.

⁴⁹ Brown R, above, p 92.

candidate for interview on the basis of a brief curriculum vitae. The curricula vitae identified the sex of the candidate and indicated either traditionally masculine, feminine or neutral interests. The researchers found that the sex and interests of the candidates influenced managers. Male candidates were more likely to be short-listed for a sales manager job and females for a dental receptionist position.⁵⁰

However, other studies on the effect of gender stereotypes have found that a minimal amount of subjectively diagnostic information about an individual's actual behaviour can be sufficient to displace stereotypical judgements. A study by Locksley et al looked at the effect of individuating information on the stereotype that men are more aggressive than women.⁵¹ In the first experiment subjects were given a five page fictitious but ostensibly real transcript of a telephone conversation between two college students that described three experiences which the student had had over the past week. The behaviour of the student was either passive or assertive. The sex of the student was either identified as male or female or not identified to the subjects. The experiences involved being harassed by a seedy character while shopping, interrupting a student in class and breaking into a group conversation at a party. Subjects were asked to predict the characteristics of the student and to predict how he/she would react in a number of novel situations.

The researchers hypothesised that the subjects' assessments of the student would be affected by the stereotypical view that men are more likely to be assertive than women. Contrary to their expectations, the researchers found no evidence for this hypothesis. Instead, "subjects relied on available behavioural information to predict the target's behaviour in novel situations and to rate the target on a set of personality trait dimensions."⁵² The researchers concluded that: "a strong implication of this research is that a minimal amount of diagnostic target case information would be sufficient to eliminate the impact of stereotypical beliefs on judgements of the target individuals."⁵³

The researchers conducted a second experiment in which subjects were first asked to indicate their beliefs about the percentage of males who are assertive and the

⁵⁰ Brown R, above, p 93.

⁵¹ Locksley A et al, 'Sex stereotypes and social judgement' (1980) 39 Journal of Personality and Social Psychology 821.

⁵² Locksley A et al, above, p 825.

⁵³ Locksley A et al, above, p 826.

percentage of females who are assertive. The mean percentage for the number of males judged to be assertive was 56.1% whereas the mean estimate for women judged to be assertive was 43.5%. A difference of almost 13 percentage points. The subjects were then asked to make trait judgements on the basis of (a) sex alone, (b) sex and a brief description of a single behavioural event which was intended to be non-diagnostic in relation to the trait of assertiveness and, (c) sex and a brief description of a single behavioural event which was intended to be diagnostic in relation to the trait of assertiveness.⁵⁴

The researchers found that when subjects only had information about the target's sex they were more likely to find that male targets were assertive than female targets. This pattern continued when the subjects had additional non-diagnostic information about the targets. In contrast, when the subjects were given diagnostic information about the targets their judgements about male and female targets were virtually identical. In other words, the subjects no longer relied on their stereotype about the relative assertiveness of women and men. The researchers concluded that "a *single* instance of moderately diagnostic information is sufficient to swamp the effects of social category information."⁵⁵

A second study by Locksley et al investigated the effect of strong and weak diagnostic information on stereotypical beliefs.⁵⁶ The study considered both stereotypical views on levels of male and female aggression and stereotypical beliefs about 'night people' and 'day people'. Both experiments in the study found that stereotypical beliefs were ignored whether the case information was strongly or only weakly diagnostic of the criterion.⁵⁷ The Locksley studies provide some evidence for the hypothesis that even weakly diagnostic information about an individual can lead an individual to disregard a pre-existing stereotype.⁵⁸

⁵⁴ The non-diagnostic descriptions included the following example: "Yesterday Tom went to get his hair cut. He had an early morning appointment because he had classes that day. Since the place where he gets his hair cut is near the campus, he had no problem getting to class on time." The diagnostic descriptions included: "The other day Nancy was in a class in which she wanted to make several points about the readings being discussed. But another student was dominating the class discussion so thoroughly that she had to abruptly interrupt this student in order to break into the discussion and express her own views."

⁵⁵ Locksley A et al, above, p 830.

⁵⁶ Locksley A et al, 'Social stereotypes and judgements of individuals: an instance of the base rate fallacy' (1982) 18 Journal of experimental and social psychology 23.

⁵⁷ Locksley A et al, above, p 38.

⁵⁸ For criticisms of the Locksley studies see Brown R, above, p 90.

IS THE BLANKET PROHIBITION ON SEX STEREOTYPES WARRANTED?

Much of the bad press associated with stereotyping derives from the assumption that they are inaccurate or, as best, contain only a kernel of truth. Quite clearly, there is no logical basis for acting on the basis of wholly inaccurate assumptions. Thus, in relation to a particular model of car there is no point in buying a green car as opposed to a blue car on the assumption that green cars go faster than blue cars. In this context, the stereotype in question (ie that colour has an impact on speed) is wholly inaccurate. However, some stereotypes, although not 100% accurate are true about a relatively high proportion of the members of the group. For example, the stereotype that women do not have the strength to lift heavy weights is true about a relatively high proportion of women.⁵⁹ Thus, the stereotype is a reasonable basis for predicting whether a particular women has the ability to lift heavy weights. Furthermore, there is evidence to support the hypothesis that, in relation to some characteristics at least, ordinary people's estimates of the degree of difference are fairly accurate. It is not the case that all stereotypes are necessarily exaggerated and, in some cases, there is a tendency to under estimate group differences.

How accurate does a stereotype have to be before an employer should be able to rely on it? If the issue is whether an individual has a particular characteristic or not, it is only rational to rely on a stereotype if it is over 50% accurate as this indicates that it is more likely than not that the characteristic applies. If it is known that 4% of men are colour blind and the only information known about a person is his sex, it would be irrational to assume that a particular man is colour blind. To the contrary, the rational assumption to make would be that the man is not colour blind. Thus, 51% is the minimum level of accuracy that can give rise to a rational decision.

The position is slightly different if the issue is whether it is more likely that a man or woman has a particular characteristic. In this situation the important factor is the size of the difference between the two figures rather than the absolute numbers. Assume the characteristic in question is nimble fingers. Is the stereotype accurate enough if 90% of women and 20% of men have flexible fingers? What if the figures are 70% and 30% or

⁵⁹ One study found that women had an average of 44% of the upper body strength of men and 72% of the leg strength: Baker M ed, *Sex differences in human performance*, (1987) p 109.

even closer at 54% and 52%? It is almost certainly impossible to fix on a figure that will apply in all cases. Another way of looking at the problem is to analyse the level of risk that an employer should have to take that a particular employee will lack a particular characteristics. Considered from this perspective the answer is probably that it depends on the consequences of the characteristics being lacking in relation to the job in question. If the characteristic is nimble fingers and the job is sewing shirts, the consequences to the employer of a lack of nimbleness is a lack of productivity. By comparison, if the job in question is micro surgery the consequences for the employer are potentially more serious. It is arguable that a lower level of accuracy is warranted in the latter case than in the former case. Thus, the impact on the employer is likely to be the one of the factors that determines the level of accuracy required in any particular case.

Accuracy is only one of the factors that needs to be taken into account. Also relevant is the question of individuating information. An employer may be accurate in its assumption that 90% of women are incapable of operating a particular piece of machinery because they lack the requisite body strength. However, it would be irrational for an employer to rely solely on that assumption in the face of evidence that a particular woman has previously operated the same kind of machinery for another employer. This additional information clearly means that the employer's stereotype, although highly accurate, does not apply in this particular case.

This raises the question of how far an employer should have to go in obtaining individuating information. Some anthropometric characteristics such as height, strength and flexibility are relatively straightforward to assess. However, many characteristics that are deemed desirable in a work environment are more difficult to measure. For example, an employer may be looking for a highly assertive personality. Not only is this difficult to measure on an objective basis but there is the associated problem of shifting standards to content with. A job may involve a high level of training and investment on the part of the employer. In return, the employer may be looking for an employee who is willing to stay in the job for a substantial period of time. The employer may be aware of a relatively accurate stereotype that women tend to stay in the same job for longer than men. Obviously, this is affected by a large number of personal factors such as age, the state of the job market and family circumstances. However, the impact of these factors on a particular individual is difficult to predict particularly over the long term.

Therefore, in the absence of any specific information that indicates an individual is unlikely to stay in the job for a substantial period, it would be rational for the employer to rely on the stereotype.

Accordingly, there are two hurdles confronting an employer wishing to rely on a sex stereotype. The first is that the stereotype is sufficiently accurate and the second is that there is no reasonably accessible individuating information. In practice, there are likely to be very few situations in which these two criteria are satisfied. In terms of accuracy, the vast majority of sex differences are not particularly large⁶⁰ and, therefore, it is unlikely that an employer will be able to show that it is rational to rely on them. Even where the differences are at their largest, for example differences in physical strength, in most cases individuating information is relatively easily accessible. Thus, it seems that there is little scope for employers to use sex stereotypes on a rational basis. However, that does not mean that there is no scope for their rational use. It is possible that there are some circumstances where the two criteria set out above are satisfied. This would make the use of a sex stereotype rational and could form the basis for an exception to the blanket prohibition. However, rationality by itself is not a sufficient basis for an exception to the prohibition. In the context of indirect discrimination the use of measures that have a disproportionate impact on one sex may be rational but they are only lawful if the employer can demonstrate that the practice is objectively justified. The justification defence is discussed in more detail in chapter five but one of its key elements involves a balancing exercise between the benefit to the employer and the detriment suffered by the employee. It is arguable that any exception or defence to the use of a sex stereotype would have to incorporate a similar proportionality test. The exact format of a possible justification defence for direct sex discrimination is discussed in detail in chapter 7. For the purposes of this chapter it is sufficient to make the point that there is scope for the rational use of sex stereotypes by employers which could give rise to the basis for an exception or defence to the blanket prohibition against their use.

⁶⁰ See Baker M, above and Archer J and Lloyd B, *Sex and gender*, (1985) for an overview of the main physical and cognitive sex differences.

CONCLUSION

It is often assumed that stereotyping arises from a defect in the cognitive processes of the brain. In fact, there are two competing theories that explain why stereotyping takes place. The first theory sees categorisation as a way of dealing with information overload by putting people and objects into categories in order to reduce the stimuli to a manageable number. The second theory sees categorisation as a positive development on the part of the mind that allows for the drawing of inferences thereby giving the individual more information on which to make rational decisions. Whichever theory is correct, it is clear that categorisation is part of the normal cognitive process and does not constitute any malfunction or wrong thinking on the part of the individual. To the extent that there is a problem with stereotyping it arises from the second part of the process, the attribution of characteristics on the basis of group membership. Even then, in many circumstances it is entirely rational to infer that a person has a particular attribute on the basis of group membership because the stereotype is highly accurate. However, even if a stereotype is highly accurate, it is irrational to rely on it in the presence of individuating information that contradicts the stereotype.

The use of sex stereotypes in the employment context needs to be examined in the light of these two conditions on the rational use of stereotypes. The stereotype must be accurate and there must be an absence of additional information about the individual that contradicts or undermines the stereotypes. In practice, there are likely to be few situations in which these conditions are satisfied in an employment context because the closeness of the relationship means that it is possible for employers to access individuating information. In an appointment situation the employer can test whether an individual has a particular characteristic in interview, through the use of psychometric or other tests, or by taking-up references from a previous employer. Individuating information is even more accessible for existing employees particularly if they have worked for the employer for a considerable period of time. Thus the need for employers to second guess whether an individual has a particular characteristics on the basis of his or her sex should be very limited. However, there may be situations in which sex is the only available indicator of whether an individual has a particular characteristic. If that situation arises, and if the stereotype relied upon is sufficiently accurate, there is an

arguable case that the use of the stereotype should be lawful subject to the application of an appropriate justification defence.

LEGISLATIVE EXCEPTIONS

INTRODUCTION

This chapter considers the main existing legislative exceptions that apply to cases of direct discrimination in order to determine their scope and underlying rationale. The four exceptions considered are sex as a genuine occupational qualification, positive action, pregnancy and maternity, and, in the field of occupational pension schemes, actuarial factors and bridging pensions.¹

SEX AS A GENUINE OCCUPATIONAL QUALIFICATION

European Law

The ETD has a general exception for situations in which the sex of the worker constitutes a determining factor. There is no similar exception in Article 141, no doubt because the rationale underlying the exception warrants the exclusion of one sex from certain jobs rather than paying them less once they are in a job. Article 2(2) of the ETD states:

This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

Furthermore, article 9(2) provides that member states shall periodically review any occupations excluded under article 2(2) to see if the exclusions should be maintained in the light of social developments.²

The ETD does not define when sex constitutes a determining factor. There is very little case law on the scope of the derogation although, in the three cases that have

¹ Although there are other Exceptions in the legislation they relate to employment in particular professions and, therefore, they do not disclose any general principles in terms of their underlying rationale. The three Exceptions are: police officers (s 17), ministers of religion (s 19) and prison officers (s 18).

² For the combined impact of articles 2(2) and 2(3) see: Fenwick H, 'Special protections for women in European Union Law' in Hervey T and O'Keefe D eds, *Sex equality in the European Union*, chp 5 (1996).

come before the ECJ the Court has held that the following jobs are covered; armed police officers,³ midwives⁴ and prison warders.⁵ In addition, it is possible to derive a few principles about the scope of the derogation from the case law. First, as the article is a derogation from the rights of the Directive it should be interpreted strictly.⁶ Second, as with all derogations the article is subject to the principle of proportionality. Exactly what that principle means in the context of article 2(2) was explained by the ECJ in the case of *Johnston v Chief Constable of the Royal Ulster Constabulary*.⁷ The applicant was dismissed from her job as a result of the respondent's decision not to arm female police officers. The applicant complained of sex discrimination and the tribunal referred to the ECJ the question of whether employment as an armed member of a police force is a job for which the sex of the worker constitutes a determining factor under article 2(2). The ECJ held that given the situation in Northern Ireland, it was possible to argue that the carrying of firearms by policewomen might create additional risks of their being assassinated and, therefore, it might be contrary to the requirements of public safety.⁸ In those circumstances it may be that the sex of the police officer constitutes a determining factor subject to the application of the proportionality principle.

It must also be borne in mind that, in determining the scope of any derogation from an individual right such as the equal treatment of men and women provided for by the directive, the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitutes the decisive factor as regards the context of the activity in question. (para 38)

In other words, as in cases of justification of indirect discrimination, the European test of proportionality involves an investigation as to whether there is a causal link between the

³ *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] 3 CMLR 240, ECJ. For a note of this case see Shrubbsall V, 'Protective practices and the Equal Treatment Directive' (1987) 16 ILJ 118.

⁴ *Re Equal Treatment Directive: EC Commission v United Kingdom* [1984] 1 CMLR 44, ECJ.

⁵ *Re Sex Discrimination in the Civil Service: EC Commission v France* [1989] 3 CMLR 663, ECJ.

⁶ *Johnston v Chief Constable of the Royal Ulster Constabulary*, see above.

⁷ See above.

⁸ The Court appears to have accepted at face value the respondent's argument that policewomen are more likely to be assassinated than policemen. It is not immediately apparent why this should be the case: see Ellis E, *EC Sex Equality Law*, (1998) p 238.

aim of the employer and the means chosen to achieve that aim and whether there is any other non-discriminatory means of achieving the same aim.

Third, the derogation only applies to specific jobs and not to wider categories such as employment in a private household. The ECJ made this point in *Re Equal Treatment Directive: EC Commission v United Kingdom*⁹ when the European Commission complained about the exception in s 6(3) of the SDA for private households and employers employing five or less employees. The United Kingdom government argued that the former exception fell within the scope of article 2(2) because employment in a private household or by a small employer involves close personal relationships and it would not be legally possible to prevent employers from employing a person of a certain sex. The ECJ rejected this argument on the basis that while there may be some jobs in private households and with small employers that are of a personal nature and fall within article 2(2), it is not the case for all kinds of employment. The final principle that can be extracted from the cases is that any exceptions must be transparent so that it is possible to identify exactly which jobs are being restricted to one sex.¹⁰ Thus, it is not permissible to use quotas in the recruitment of all police officers on the basis that some police jobs can be performed only by one sex.¹¹

Domestic Law

In contrast to the European derogation, s 7 of the SDA sets out a precise list of the circumstances in which sex can be a genuine occupational qualification. Section 7 is an attempt to deal with all of the physical and social differences between the sexes that can be relevant to the performance of any particular job. As the Government conceded at the second reading of the Bill, this was “inevitably a difficult drafting job”.¹² However, the Government resisted the attempts of the Opposition to insert a more general defence that would apply whenever the tribunal was satisfied that sex was a genuine occupational qualification “having regard to equity and the substantial merits of the case”.¹³ The opposition argued that it was necessary to have a safety-net exception in order to prevent

⁹ [1984] 1 CMLR 44, ECJ.

¹⁰ *Re Sex Discrimination in the Civil Service: EC Commission v France* [1989] 3 CMLR 663, ECJ.

¹¹ For the implementation of article 2(2) in other members states see: Docksey C, ‘The principle of equal treatment between women and men as a fundamental right under Community law’ (1991) 20 ILJ 258 at 267.

the measure from coming into disrepute by some unforeseen case. However, the government successfully defeated the proposed amendment on the basis that if some justifiable exception came to light in the future, it could be introduced into the SDA by statutory instrument under s 80.¹⁴

The exceptions only apply to appointments, promotions, training and transfer (s 7(1)). They do not apply to dismissals¹⁵ or to terms and conditions of employment.¹⁶ Furthermore, it is not necessary that all of the duties of a job fall within one of the exceptions as long as some of the duties are covered (s 7(3)). In a case on the similarly worded provisions in the RRA, the EAT held that the genuine occupational qualification will apply if the relevant duty is “not so trivial that it can properly be disregarded altogether”.¹⁷

The exceptions in s 7 cover a multitude of situations.¹⁸ However, it is possible to identify four separate rationales underlying the exceptions.¹⁹ These are artistic licence, decency, social utility and financial considerations. The scope of the various exceptions is considered in more detail below under these four headings.

¹² Roy Jenkins (Secretary of State for the Home Department) 889 HC 511.

¹³ Ian Gilmour, Standing Committee B, 1 May 1975, 178.

¹⁴ Under s 80(1) the Secretary of State can amend s 7 by an order the draft of which has been approved by both Houses of Parliament. The likelihood is that any general exception would have been struck down by the ECJ in the same way that the general exception for small employers and private households was rejected by the Court (see above).

¹⁵ In a redundancy situation where the job content of the remaining job is to be altered in order to add duties that constitute a genuine occupational qualification, it is possible to separate the transfer to the new job from the dismissal of the remaining employees. In this way, it is possible to take advantage of s 7 despite the fact that it does not apply to dismissals: *Timex Corporation v. Hodgson* [1982] ICR 63, EAT.

¹⁶ As there is no parallel provision in the EPA or Article 141 it is not possible to give an employee less favourable contractual benefits on the basis of a genuine occupational qualification.

¹⁷ *Tottenham Green Under Five's Centre v. Marshall* (No 2) [1991] IRLR 162, EAT.

¹⁸ There are four additional exceptions that only apply in cases of discrimination on the ground of gender reassignment. These are intimate physical searches under statutory powers, working in a private home, shared accommodation and the provision of personal services to vulnerable individuals. The latter two exceptions are only temporary in that they cease to apply once the gender reassignment process is complete: Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999 No 1102.

¹⁹ There is one exception that does not appear to have any obvious rationale. The exception applies when a job is one of two to be held by a married couple (s 7(2)(g)). As it is not contrary to the SDA to discriminate against an unmarried person, the effect of the exception is to allow an employer to specify which of two jobs should be held by each member of a married couple. In other words, an employer can advertise for a cleaner and a gardener and stipulate that the former is done by the wife and the latter by the husband. It is not clear why such an exception exists given that in any other context, an employer cannot stipulate that a cleaner should be a woman and a gardener a man.

Artistic licence

The exception in s 7(2)(a) provides for what can loosely be described as a degree of artistic freedom. The section applies to dramatic performances or other entertainment where, for reasons of authenticity, the essential nature of the job would be materially different if carried out by a person of the other sex.²⁰ The result is that producers of dramatic performances or other forms of entertainment are given a relatively free hand when it comes to casting decisions. Thus, if a play is written with a part for a male doctor, the producer is not obliged to consider women actors for the part despite the fact that women can act as men and visa versa. Or, if the entertainment on offer is live telephone chat with “girls”, the employer is entitled to reject any applications from men.²¹ In theory, the exception is limited to cases where a man or woman is needed for reasons of authenticity. However, in practice the authenticity requirement is often ignored in cases involving conceptual casting.²² This is where a woman is cast in a man’s role to make a point (eg Fiona Shaw as Richard II at the National Theatre) or purely for artistic effect (eg the production of the ballet Swan Lake using male swans).

Decency

The second category of exception balances the anti-discrimination principle against the individual rights of privacy and decency. Although both of these words appear in the SDA, in fact privacy does not appear to play any part in the rationale for the defence. The right to privacy implies a right to solitude or seclusion, the idea that individuals have, in some circumstances, a right to be left alone. In fact, this right is not protected at all by s 7. The legislation does not give an individual a right to undress in private, only a right not to undress in the presence of someone of a particular sex. As a result, the exceptions are primarily aimed at the preservation of decency rather than any right to privacy.

There are no less than three sub-sections devoted to the preservation of decency. Section 7(2)(b) ensures that people do not have to undress or use sanitary facilities in the

²⁰ Section 7(2)(a) also applies in other situations which are considered below under the heading of social utility.

²¹ *Cropper v UK Express Ltd* EOR Discrimination Case Law Digest No 12 Summer 1992, p 2.

²² Pitt G, ‘Madam Butterfly and Miss Saigon: reflections on genuine occupational qualifications’ in Dine J and Watt B, eds, *Discrimination law: concepts, limitations and justifications*, chp 15, (1996).

presence of someone of the opposite sex. Thus this exception applies to shop assistants whose work involves measuring and fitting customers²³ and care attendants whose responsibilities include the provision of intimate care.²⁴ One of the main uses of this section is to restrict women from working in men's toilets and visa versa.²⁵

Section 7(2)(ba) applies where an employee either works or lives in a private household. A householder can make reasonable objection to a person of a particular sex working in the house where the job involves a degree of physical or social contact with a person living in the home or the employee is likely to gain knowledge of a person's intimate details.²⁶ There is a considerable overlap between this section and s 7(2)(b). For example, a home help who helps an elderly person with getting dressed would be covered by s 7(2)(b). In practice, there are unlikely to be many cases that do not satisfy the decency test of s 7(2)(b) but have a sufficient degree of physical or social contact or knowledge of intimate details in order to come within s 7(2)(ba).²⁷ One situation that might come within s 7(2)(ba) but not s 7(2)(b) is where physical contact is required but the recipient is not in a state of undress or using sanitary facilities, for example an elderly person who requires help with eating.

Section 7(2)(c) deals with the situation where due to the nature or location of the establishment, the job holder has to live in premises provided by the employer. Two conditions have to be satisfied for the section to apply. First, the premises are not equipped with separate sleeping accommodation or sanitary facilities that could be used by women in privacy from men. Second, it is not reasonable to expect the employer to equip the premises with separate accommodation and facilities. This section is meant to cover jobs where there is degree of residence required for example work on ships,

²³ *Rowson v. Contessa (Ladieswear) Ltd* EOR Discrimination Case Law Digest No 23 Spring 1995 p 4. Although, the exception won't apply where it is possible to reallocate the measuring or fitting part of the job to another employee without causing undue inconvenience to the employer: *Wylie v. Dee & Co (Menswear) Ltd* [1978] IRLR 103 IT.

²⁴ *Salisbury v. Aster House Nursing Home* EOR Discrimination Case Law Digest No 14 Winter 1992, p 4.

²⁵ See for example *Carlton v. Personnel Hygiene Services Ltd* EOR Discrimination Case Law Digest No 3 Spring 1990, p 3.

²⁶ This section replaces the previous exemption in s 6(3) for private households after the ECJ ruled that a general exclusion for private households infringed the provisions of article 2(2) of the ETD. See *Re Equal Treatment Directive: EC Commission v United Kingdom*, above. Section 6(3) was repealed by s 1(2) of the SDA 1986.

²⁷ See for example *Neal v. Watts* EOR Discrimination Case Law Digest No 3 Spring 1990 p 2.

lighthouses and remote construction sites. It does not cover shift work even if the shifts are long enough for the employee to sleep on the premises.²⁸

Social utility

Three of the exceptions in s 7 are to some extent based on social utility arguments. In other words, in some circumstances direct discrimination enhances some benefit to society and that benefit outweighs the goal of sex equality. Thus, it may be preferable to discriminate in the recruitment of sex education counsellors if the result is a reduction in the number of unwanted pregnancies. This is the same social utility argument that is sometimes used in the context of reverse discrimination and positive action.²⁹

First, as well as providing for a degree of artistic licence, s 7(2)(a) also applies where “the essential nature of the job calls for a man for reasons of physiology (excluding strength or stamina”.³⁰ This exception covers the few jobs where the existence of a categorical or unique sex difference means that only one sex can physically perform the job. The rationale for these jobs tends to be a social utility one although it can also cover situations where one sex is needed to do a job for financial reasons (see below). Obvious social utility examples are surrogate mothers and sperm donors.

Second, there is an exception in s 7(2)(e) that applies where the job holder provides individuals with personal services³¹ such as the promotion of their welfare or education and those services can most effectively be provided by a person of that sex. The references to welfare and education indicate that this is mainly, if not wholly, a social utility exception. In practice, the courts seem to be reluctant to accept that a service can most effectively be performed by one sex except in the most limited

²⁸ *Sisley v Britannia Security Ltd* [1983] ICR 628 EAT.

²⁹ Pitt G, ‘Can reverse discrimination be justified’ in Hepple B and Szyszczak E eds, *Discrimination: the limits of law*, chp 16 (Mansell, 1992).

³⁰ Physiology is an odd word to use as it means the study of the bodily functions of living organisms. Pannick suggest that the word physique might more accurately capture what Parliament intended: Pannick D, ‘When is sex a genuine occupational qualification’ (1984) 4 OJLS 198 at 209.

³¹ The definition of personal services does not extend to cleaning rooms, emptying bins and commodes or collecting personal laundry: *Phillips v. The Chaseley Rest Home* EOR Discrimination Case Law Digest No 30 Winter 1996 p 4.

circumstances.³² No doubt this is partly because customer preference in these cases largely consists of certain stereotypical views about the sexes eg the view that women find it easier to talk to women about their personal problems. For example, in *Roadburgh v Lothian Regional Council*³³ the tribunal refused to accept that the post of volunteer services officer with the respondent's social work team could be performed more effectively by a man given that women were performing the same job in other areas.³⁴ Similarly, in *Moult v Nottingham County Council*³⁵ the tribunal rejected the argument that the post of teaching and counselling women with no confidence and low self-esteem on a women only training course could be performed more effectively by a woman. In fact, there appear to be no reported cases where the exception for personal services has been successfully relied upon although this may be because some of the more obvious examples of situations in which the defence could be used (eg a rape counsellor or a sex therapist) have not been challenged.

The third exception that appears to be social utility based is the exception in s 7(2)(d) for single sex establishments. The sub-section only applies if three conditions are met. First, the establishment must be a hospital, prison or other establishment for people requiring special care, supervision or attention.³⁶ Second, all of the people must be of one sex although it is possible to disregard a person of the other sex if his or her presence is exceptional.³⁷ Third, it is reasonable, having regard to the essential character of the establishment, that the job should not be held by a person of that sex. Decency and the need for certain personal services to be provided by a person of the same sex are already dealt with elsewhere in s.7. As a result, this sub-section must be directed at people who are not coming into physical contact with the inmates of the establishment, are not

³² The correct comparison is between a woman and a man, both with the right personality and qualifications: *Greenwich Homeworkers Project v Mavrou* EOR Discrimination Case Law Digest No 8 Summer 1991 p 3.

³³ [1976] IRLR 283 IT. The tribunal also pointed out that there is nothing in s 7 or any other part of the Act which allows discrimination on the ground of sex "simply because there happens to be an imbalance of the sexes in the team in which the vacancy exists".

³⁴ See also *Fanders v. St Mary's Convent Preparatory School* where the respondent failed to convince the tribunal that teaching infant girls was a service that could most effectively be performed by a woman: EOR Discrimination Case Law Digest No 3 Spring 1990 p 3.

³⁵ EOR Discrimination Case Law Digest, No 22, Winter 1994, p 4.

³⁶ In relation to children, special must be measured in relation to normal children of that age: see *Fanders v. St Mary's Convent Preparatory School* EOR Discrimination Case Law Digest No 3 Spring 1990 p 3.

³⁷ Not surprisingly, in *Phillips v. The Chaseley Rest Home* the tribunal rejected the respondents argument that having five male residents in a nursing home out of a total of 24 was not exceptional: EOR Discrimination Case Law Digest No 30 Winter 1996 p 4.

likely to see them in a state of undress and are not providing them with personal services. The question then is what job could they be doing that requires them to be the same sex as the inmate? There have been no reported cases where a respondent has successfully relied upon this section. However, the kind of situation where the section *might* apply is in relation to a shelter for female victims of domestic violence where the psychological state of the women is such that they would be disturbed by the presence of any men on the premises.³⁸

Financial

In the White Paper that preceded the SDA the Government stated that exceptions would not be allowed on the basis that one sex is more costly to employ.³⁹ However, financial considerations can be a factor where the physiological differences between the sexes (other than physical strength or stamina⁴⁰) mean that sex is essential to the nature of the job. This exception is wide enough to cover not only categorical or unique sex differences but also physiological distribution differences such as body shape. There are likely to be few jobs where physical characteristics such as these are essential to the nature of the job but one possible example is fashion models. It is possible to argue that because women and men have different body shapes the effect of a man modelling a dress is materially different from the effect of a woman modelling the same dress. However, it is important to distinguish between situations where sex is essential to the nature of the job and attempts by employers to use sex appeal in order to increase profits. For example, it would not be open to an employer to refuse to hire waiters on the basis that waitresses attract more customers.⁴¹

The other exception that is financially based is the exception for working abroad in s 7(2)(g). This section applies where the job involves the performance of duties outside the United Kingdom in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by one sex.⁴² This section was

³⁸ Although, during the Committee stage of the Bill, Dr Summerskill stated that the section did not provide a blanket exception for all of the jobs in a single sex institution: House of Commons, Standing Committee B, 1 May 1975, 171.

³⁹ *Equality for women*, cmd 5724, (1974), para 48.

⁴⁰ See for example *Thorn v. Meggitt Engineering Ltd* [1976] IRLR 241, IT.

⁴¹ See Pannick, above, p 209.

⁴² As the SDA does not apply where an employee does his or her work wholly or mainly outside Great

introduced to deal with what was referred to as the “Middle East export salesman problem”.⁴³ The rationale behind the section is that it is not right to injure the country’s prospects of trading abroad by making it possible for a woman to claim that she should be employed as an export salesman to Saudi Arabia.⁴⁴ This is perhaps the clearest example of a situation in which the financial interests of employers are allowed to take precedence over the non-discrimination principle.

Proportionality

Under article 2(2) of the ETD, any derogations from the principle of equal treatment are subject to the principle of proportionality. In other words, there must be a causal link between the aim of the employer and the means chosen to achieve that aim, and there must be no other less discriminatory means of achieving the same aim. Although there is no express proportionality test in s 7 there are several conditions that have a similar, albeit more limited, effect. The causation test can be detected in several of the exceptions although the standard of the test varies. In section 7(2)(a) (which applies in cases of artistic licence, social utility and financial considerations) the employer has to show that certain physical characteristics are essential to the nature of the job. In order to do this the employer has to establish that there is a causal link between its aim and the sex of the employee.

The causal link is much weaker in the decency exceptions. The employer just has to demonstrate that a reasonable person might object to the presence of a person of the offending sex (save in cases of communal accommodation where even this weak test is lacking). Thus, there is no need for the employer to show that the presence of a person of the offending sex actually would result in a lack of decency. In relation to the exception for personal services (which is primarily a social utility exception) the employer has to show that a person of one sex can *most effectively* perform the job in question. This requires strong proof of a causal link between sex and ability to do the job. Finally, the financial exceptions also require some evidence of a causal link. As indicated above,

Britain (s 10) the exception only applies where an employee mainly works inside Great Britain but some of the work is done abroad.

⁴³ John Fraser (Under-Secretary of State for Employment) House of Commons, Standing Committee B, 1 May 1975, 173.

⁴⁴ See above at 174.

where the exception falls under s 7(2)(a) the employer has to show that the particular physical characteristic that makes one sex more financially successful are essential to the nature of the job. And, where the exception is working abroad, the employer has to show that the job *could not effectively* be done by a person of the other sex.

The means test exists in the form of s 7(4). Under this section the tribunal must be satisfied that the employer does not already have employees of that sex who could reasonably do the duties *without causing undue inconvenience to the employer*.⁴⁵ For example, sex is not a genuine occupational qualification for being a shop assistant if the duties involving personal contact with customers in the changing room could be allocated to another assistant.⁴⁶ Arguably, the test of undue inconvenience is weaker than the European means test. For example, it seems that there is no scope for a tribunal to consider whether the duties could be dispensed with altogether rather than allocated to another employee. In *Lasertop Ltd v Webster* it was held that the job of showing prospective clients around the changing rooms and toilets of a health club could not be allocated to another member of staff on the basis that it would undermine the selling function of the job. In unisex health clubs it is often the case that women show men around and leave them to look at the changing rooms and toilets themselves.⁴⁷ In this particular case the tribunal found that the tour of the prohibited areas only occupied a comparatively small amount of time. While it may have been inconvenient for these parts of the tour to have been done by another employee, there is no evidence that it would have had any impact on employer's business if prospective members were left to view these areas on their own. Similarly, in *Sisley v. Britannia Security Ltd*⁴⁸ the male applicant was refused a job as a security operator so that the existing female operators could strip to their underwear while resting and thereby prevent their uniforms from creasing. The EAT rejected the argument that the problem could be avoided by the operators resting fully dressed.⁴⁹

⁴⁵ Section 7(4) does not apply to s 7(2)(ba) (private households) or s 7(2)(h) (married couples). It also does not apply in relation to employees who are yet to be recruited: *Lasertop Ltd v. Webster* [1997] IRLR 498, EAT.

⁴⁶ *Etam plc v Rowan* [1989] IRLR 150, EAT. However, see also *Timex Corporation v Hodgson* [1982] ICR 63 in which the EAT failed to apply the provisions of s 7(4) but commented instead that it was not for the tribunal to tell the employer how to organise its business.

⁴⁷ EOR No 75 September/October 1997 p 52.

⁴⁸ [1983] ICR 628 EAT and Pannick, above, p 218.

⁴⁹ Although, contrast the case of *Phillips v The Chaseley Rest Home* EOR Discrimination Case Law Digest

The other area where it is possible to detect a means test is in the exception for single sex accommodation. The employer has to satisfy the tribunal that it is not reasonable to equip the premises with additional accommodation facilities. As a result, a tribunal must consider whether it is reasonable for the employer to build extra facilities but not whether it would be reasonable to make the existing accommodation unisex. The section does not give any guidance on the points to be taken into account in determining reasonableness but relevant factors are likely to include the cost of the building work (including any indirect costs that may arise eg as a result of disruption to the business) and the ability of the employer to accommodate the cost.⁵⁰

POSITIVE ACTION

Introduction

The second, and potentially most extensive category of exceptions, centres around the concept of positive action. Positive action is a phrase that can cover a multitude of things and, therefore, it is helpful to provide a more precise definition of what it means. McCrudden has identified four types of measure that could come under the heading of positive action.⁵¹ The first form of action he identifies is removing existing discriminatory practices. This involves the eradication of all forms of direct and indirect discrimination. For example, the removal of an age limit that cannot be justified on the basis of business need would be a form of positive action as would the removal of a rule preventing women from doing certain forms of work.

The second form of positive action involves using facially neutral criteria in order to increase the proportion of an under represented sex in a particular job or profession. For example, the creation of childcare facilities or the reorganisation of working time.⁵² The third form of positive action involves outreach programmes that are designed to

No 30 Winter 1996 p 4 where the tribunal held that a male cleaner could avoid seeing a female resident in a state of undress or using the toilet by knocking on the door before entering the room.

⁵⁰ Tribunals are likely to draw parallels with the test for reasonable adjustments under the DDA as it is logical that if an adjustment is reasonable under the DDA it should also be reasonable under the SDA.

⁵¹ McCrudden C, 'Rethinking positive action' (1986) 15 ILJ 219. In fact he identifies five types of positive action. His fifth type of positive action involves redefining merit so that membership of a particular group becomes a job related qualification. The scope for this kind of positive action is dealt with in the social utility section on genuine occupational qualifications above.

⁵² Prechal argues that "it is inappropriate to use the "term positive action" in relation to this type of measure, since it amounts to unnecessarily inflating the concept": 'Case note on *Kalanke*' (1996) CML Rev 1245 at 1252.

attract candidates from an under represented group either by bringing jobs to their attention and encouraging them to apply or by providing members of the under represented group with relevant training that will improve their employment prospects. The final type of positive action is preferential treatment or reverse discrimination. McCrudden describes this form of positive action as using membership of an under represented group as a criterion in selection, promotion or redundancy decisions. Group membership may be the sole criterion, one of several relevant criteria or a tie-break criterion, for example where women are preferred over equally qualified men. However, it can also extend to the award of beneficial treatment or training. For example, a rule giving only one sex childcare vouchers or providing single sex training can also be a form of reverse discrimination. What distinguishes reverse discrimination from any other form of direct discrimination is the motivation behind the treatment. With reverse discrimination, sex is used in order to improve the position of members of a group that is currently disadvantaged or under represented in relation to some aspect of employment.⁵³

European Law

The main European provision on positive action is contained in article 2(4) of the ETD which provides:

This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in article 1(1).

In addition, there is a Council Recommendation on the promotion of positive action for women.⁵⁴ The Recommendation recommends Member States to take appropriate general and specific measures in order to counteract or eliminate the prejudicial effects on women in employment and to encourage the participation of women in those sectors of working life where they are presently under represented (article 1). A number of specific measures are recommended including encouraging women candidates, the recruitment and promotion of women in sectors and professions where they are under represented,

⁵³ For some of the arguments for and against reverse discrimination see McCrudden C, above, p 237; Pitt G, 'Can reverse discrimination be justified' in *Discrimination: the limits of law* (1992) eds Hepple B and Szyszczak E; Fullinwider F, *The reverse discrimination controversy* (1980) and Dworkin R, *A matter of principle*, (1986) chp 14.

⁵⁴ 84/635/EEC. This recommendation was passed after the Commission and the Council of Ministers failed to pass a binding directive on the matter: see Charpentier L, 'The European Court of Justice and the rhetoric of affirmative action' (1998) 4(2) ELJ 167 at 178.

adapting working conditions and working time and encouraging social measures designed to foster greater sharing of occupational and social responsibilities. The Recommendation is not itself legally binding but it can be used as an aide to interpreting the scope of article 2(4) of the ETD.

Possible scope of Article 2(4)

Prior to looking at the cases on article 2(4), it is worth considering the potential scope of the article in terms of the four forms of positive action set out above, bearing in mind that the provision is extraneous unless it covers a form of positive action that is prohibited by the ETD and that is not allowed by some other derogation.⁵⁵ In other words, the article must cover a form of treatment that would otherwise be unlawful. The first of the four forms of positive action is the eradication of existing discriminatory practices both direct and indirect. Member states are already mandated to undertake this first form of positive action by article 2(1) and, therefore, there is no need for a derogation in order to make this form of action lawful. As a result, this form of positive action cannot come within the scope of article 2(4) unless the provision is otiose. The second form of positive action is the use of facially neutral criteria in order to increase the proportion of an under represented group. In order to have this effect, the measure in question must have a disproportionate impact on one sex. The use of a measure that has a disproportionate impact on one sex can give rise to a claim of indirect discrimination unless the practice is justified. As a result, the lawfulness of the measure depends on whether its use can be justified by an employer for a reason other than sex. If the measure is justified it is lawful and there is no need for a derogation from the principle of equal treatment under article 2(1). On the other hand, if the measure is not justified, it is unlawful unless it comes within the scope of article 2(4). Thus, the unjustified use of a measure that has a disproportionate impact on one sex is the first possible use for article 2(4).

The third type of positive action is the use of outreach programmes such as encouraging applicants of one sex to apply for jobs or the provision of single sex training. To the extent that these programmes are only open to one sex they are directly discriminatory and are unlawful under articles 2(1) and 4.⁵⁶ As a result, outreach

⁵⁵ See Prechal S, above, at p 1252.

⁵⁶ Article 4 applies the principle of equal treatment to all types and levels of vocational guidance and

programmes are the second kind of measure that could come within the scope of article 2(4). The final form of positive action is preferential treatment or reverse discrimination. Measures of this kind are unlawful under article 2(1) and, therefore, they could also come within the scope of the derogation in article 2(4). To summarise, there are three types of positive action which could come within the scope of article 2(4). These are unjustified indirect discrimination, outreach programmes and reverse discrimination.

Interpretation of Article 2(4) by the ECJ

The ECJ has had three opportunities to delineate the scope of article 2(4). In the first case, *Re Protection of Women: EC Commission v France*,⁵⁷ the Commission brought an action under Article 169 for a declaration that France had failed to implement fully the provisions of the ETD. In particular, the French implementing legislation left in place various protections for women. These included a reduction in working hours for women aged 59, time off for sick children, additional holiday, a day off on the first day of the school term, some hours off on Mothers' Day, daily breaks for women working on computer equipment or as typists or switchboard operators, the grant of bonuses from the birth of the second child for pension calculation and the payment of allowances for the cost of childcare. The French government argued that these rights were covered by article 2(4) because they aimed "to protect women and secure their de facto equality with men". The position of the Commission was that some of the rights may indeed fall within the scope of article 2(4) but that the overall impact of the legislation was to leave in place some inequalities that were not lawful under the ETD.

The ECJ ruled in favour of the Commission and held that the French Government had not succeeded in demonstrating that the unequal treatment was within the limits laid down by the ETD. In relation to the scope of article 2(4), the ECJ held that it is limited to removing inequalities which exist in actual working life.

As regards the exception provided for by article 2(4) it has the precise, limited object of authorising measures which, although discriminatory in appearance, actually aim to eliminate or reduce *de facto* inequalities which may exist in actual working life. However, there is nothing in the file to indicate that the general retention of particular rights for women in collective agreements may correspond to the situation envisaged by this provision.

training.

⁵⁷ [1989] 1 CMLR 408, ECJ.

In other words, it is not permissible under article 2(4) to compensate women for discrimination by giving them special rights as part of an evening-up process.⁵⁸ The measures must be aimed at eliminating or reducing actual instances of inequality. This does not mean that the ECJ found that all of the measures left in place by the French legislation were unlawful. It is possible to read the judgment as a decision that France had failed fully to implement the ETD because some, but not necessarily all, of the measures were outside the scope of the derogation. Unfortunately, the Court did not indicate which of the measures were lawful and which were unlawful. It is arguable that some of the measures, for example, help with the cost of childcare and flexible working time, are in fact measures designed to reduce existing inequality.⁵⁹ However, because the ECJ did not distinguish between the lawful and unlawful measures, the case is not particularly helpful in determining the scope of article 2(4) save for the general principle that measures must relate to actual inequality rather than a general evening-up process.

The ECJ had its second opportunity to interpret article 2(4) in the case of *Kalanke v Freie Hansestadt Bremen*.⁶⁰ This case, and the later *Marschall* case, both involved the use of positive action in the German civil service. In order to understand the background to the cases it is necessary to explain how promotion operates in the German civil service.⁶¹ Under the German Constitution, civil servants can only be promoted on the basis of personal aptitude, abilities and qualifications. In addition, the Framework Law governing state legislation on public employment imposes an obligation on public employers to select without regard to sex. These dual obligations are referred to as the merit principle. In theory, all employment and promotion decisions in the public service are governed by the merit principle. However, competitive promotion tends to be limited to higher level positions. With lower level jobs merit is determined by reference to staff reports. In order to avoid conflict between staff and supervisors, these reports tend to be homogeneous in nature and, therefore, they do not provide an effective basis for differentiating between employees. As a result, promotion decisions are often based on auxiliary selection criteria with the most common being length of service, age and

⁵⁸ This was the argument used by the Advocate General in his Opinion: p 413.

⁵⁹ This point is made by the Advocate General in the *Kalanke* case, below, at footnote 14 to his Opinion.

⁶⁰ [1995] IRLR 660, ECJ. For general comment on the case see Loenen T and Veldman A, 'Preferential treatment in the labour market after *Kalanke*: some comparative aspects' (1996) IJCLL&IR 43 and O'Hare U, 'Positive action before the European Court of Justice' (1996) 2 Webb JCLI.

⁶¹ Schiek D, 'Sex equality law after *Kalanke* and *Marschall*' (1998) 4 ELJ 148.

number of dependants. Some employers facilitate the promotion process by producing promotion lists based on staff reports and the auxiliary criteria. The use of promotion lists means that civil servants can estimate the length of time before their next promotion.

The German equality laws of individual states contain a large number of positive action measures. However, the rules on hiring and promotion can be divided into four main groups namely flexible quotas, strict quotas, result quotas and non-binding goals and timetables.⁶² A flexible quota prescribes preferential treatment for women if two conditions are met. First, there must be an under representation of women and second, the woman must be equally qualified. With the exception of two states including Bremen, the flexible quota is subject to an exception if preferential treatment for a woman would result in hardship for a male competitor. Strict quotas reserve a set percentage of positions for women over a certain period of time. Result quotas oblige employers to set goals and timetables in order to achieve a gender balance and to give preference to equally qualified women in order to achieve the goals set. Result quotas do not give rise to an individual right which can be enforced in court proceedings. Finally, there is the use of non-binding goals and timetables whereby organisations set goals for increasing the proportion of women in categories where they are under-represented but no quotas are used.

The positive action measure at issue in *Kalanke* was a flexible quota without an exception. The German court requested the ECJ to give a preliminary ruling on the compatibility of the Bremen law on equal treatment in the public service and article 2(4) of the ETD. Under the Bremen law, women who have equal qualifications to those of their male co-applicants are given priority if women are under represented. Under representation exists if women represent less than half the persons in the individual pay, remuneration and salary brackets in the relevant personnel group of an official body. The law also states that qualifications shall be evaluated exclusively in accordance with the requirements of the job and that experience or capability acquired as a result of family work or unpaid activity are to count as qualifications if they are relevant to the job in question.

In this particular case Mr Kalanke was employed by the City of Bremen in the Parks Department. He applied and was shortlisted for the post of section manager. The

other candidate was a female employee in the same department, Mrs Glissmann. When it was determined that the two candidates were equally qualified, Mrs Glissmann was appointed under the positive action provisions of the Bremen law on equal opportunities. Mr Kalanke himself argued that he should have been given precedence over Mrs Glissmann because of his status as a breadwinner for three dependants and his length of service.⁶³

The ECJ found that the Bremen law was contrary to the ETD. In relation to the scope of article 2(4) the court held:

It thus permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. (para 19)

The ECJ rejected the validity of the Bremen quotas on the following basis:

National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in article 2(4) of the Directive.

Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in article 2(4) the result which is only to be arrived at by providing such equality of opportunity. (paras 20-21)

In other words, the Court rejected the use of “absolute and unconditional” quotas but gave no indication as the validity of other form of positive action involving reverse discrimination.

The decision of the ECJ in *Kalanke* had a limited impact in the United Kingdom because any kind of employment quota is unlawful under the SDA. However, the decision was of considerable impact in Germany, several other European countries and the European Commission.⁶⁴ The decision was interpreted by the German courts as only applying to women’s quotas without exceptions thereby leaving unaffected quotas with a savings clause.⁶⁵ The European Commission issued a communication on the interpretation of the judgment which similarly indicated that, in its opinion, the judgment

⁶² Szyszczak E, ‘Positive action after *Kalanke*’ (1996) 59 MLR 876.

⁶³ Schiek, above, p 154.

⁶⁴ For an analysis of the impact of *Kalanke* in other Member States see Senden L, ‘Positive action in the EU put to the test. A negative score?’ (1996) 3 MJ 146. The European Commission operates a system by which services are encouraged to give priority to equally qualified female candidates where women are under represented in given grade or category: see Commission Communication COM (96) 88 final.

⁶⁵ Schiek, above, p 152.

only affects quotas which guarantee women absolute and unconditional priority for appointment and that less rigid quotas are untouched by the Court's judgment.⁶⁶

The ECJ had its third look at the scope of article 2(4) in the case of *Marschall v. Land Nordrhein-Westfalen*.⁶⁷ Mr Marschall was employed as a teacher at a German school. He applied for promotion to a higher graded post but was informed by the relevant authorities that since women were under represented at that grade, an equally qualified woman would be appointed to the post. The quota rule operating in the Land of North Rhine-Westphalia was as follows:

Where in the sector of the authority responsible for promotion there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to another candidate predominate.

According to the observations of the Land, the rule was intended to combat the use of two secondary selection criteria by which a man would tend to be appointed over a woman, namely, length of service and number of dependants.

The ECJ used the presence of the savings clause to distinguish its earlier decision in *Kalanke* and find that the quota was lawful. In particular, the Court used an argument that does not appear to have been relied upon by any of the parties, namely that the use of quotas could compensate for the use of sexual stereotypes in selection decisions. The relevant parts of the judgment are set out below.

As the Land and several governments have pointed out, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working

⁶⁶ See Commission Communication above, p 9. The Commission subsequently proposed an interpretative amendment to Article 2(4) in order to make it clear that positive action measures short of rigid quotas are permitted by Community law. The proposed amendment added the following wording to the end of the Article: "Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case": 96/C 179/07. The proposed amendment was rejected by the Economic and Social Committee on the basis that it failed to provide any definitive clarification and that the whole matter was already being considered by the Intergovernmental Conference to see if it could be incorporated into the primary legislation of the Community: Opinion of the Economic and Social Committee 97/C 30/19.

⁶⁷ [1998] IRLR 39, ECJ. For a case note on *Marschall* see Schiek D, 'More positive action in community law' (1998) 27 ILJ 155.

hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.

For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.

It follows that a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are underrepresented may fall within the scope of article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world. (paras 29 to 31)

Unlike the rules at issue in *Kalanke*, a national rule which, as in the case in point in the main proceedings, contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidature will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates. (para 33)

The basis of the ECJ's judgment is the argument that one of the obstacles facing women is the use of sexual stereotypes in selection decisions. In particular, the ECJ suggests that where men and women are equally qualified, there is a tendency for employers to prefer men because of assumptions that they make about the effect of women's family responsibilities on their performance at work.⁶⁸ The use of the quota rule is a method of counteracting the effect of these sexual stereotypes.

The main criticism that can be made against the judgment of the ECJ is that it failed to apply any test of proportionality. In the case of *Johnston v. Chief Constable of the Royal Ulster Constabulary*⁶⁹ the ECJ held that the derogation in article 2(2) of the ETD for situations where the sex of the worker constitutes a determining factor is subject to the principle of proportionality. There is no logical reason why that test should not also apply to the derogation in article 2(4).⁷⁰ If the principle of proportionality is applied

⁶⁸ The ECJ does not go so far as to argue that stereotypes make it more difficult for women to obtain a good merit rating and, therefore, when a man and a woman are rated as being of equal merit, the woman is in fact more meritorious than the man. This argument is put forward by Schiek who suggests that "standards evaluating professional qualifications are gendered. Thus, a man would more easily rate as qualified in a profession that is gendered masculine and a woman in a profession that is gendered feminine: see Schiek D, above, p 157. A similar point is made by Shaw J, 'Positive action for women in Germany: The use of legally binding quota systems' in Hepple B and Szyszczak E eds, *Discrimination: the limits of the law*, chp 20, (1992) at p 397.

⁶⁹ [1986] 3 CMLR 240 ECJ.

⁷⁰ In *Marschall* the Advocate General argued that gender specific measures could only be lawful under

to the *Marschall* case the employer would have to demonstrate that the quotas were appropriate and necessary in order to achieve the aim in question.

According to the ECJ, the function of the quotas is to counter balance the use of sexual stereotypes by employers. But, this does not appear to have been the reason why the Land of North Rhine-Westphalia introduced a quota system. According to the observations of the Land, the quotas were introduced in order to combat the use of two secondary selection criteria namely length of service and number of dependants. As the Advocate General pointed out, both of these selection criteria are potentially indirectly discriminatory as they tend to have a disproportionate impact on women. In other words, the hurdle to equality of opportunity that had been identified was not the use of sexual stereotypes but the use of potentially indirectly discriminatory selection criteria. As a result, the problem of under representation could have been dealt with by the Land complying with its existing obligations under article 2(1) and eliminating all forms of indirect sex discrimination.⁷¹ On this basis, the test of proportionality was not satisfied.⁷²

The attempt to distinguish the earlier *Kalanke* judgment is also problematic. First, it is not clear that there was no scope for exceptions in the Bremen law. As the Advocate General pointed out, in paragraph 9 of its judgment in *Kalanke* the ECJ referred to a finding of the national court that the rule must be interpreted as providing for exceptions in appropriate cases.⁷³ It seems, therefore, that there was scope for individual criteria specific to a male candidate to be taken into account under the Bremen law although this was not expressly stipulated in the law itself. Second, even if the savings clause was unique to *Marschall*, as the Advocate General pointed out in his

article 2(4) if two conditions were met. First, the measures must be directed at removing existing inequality. Second, the principle of proportionality applies which, in this context, means that it must not be possible to achieve the aim of equality through the use of gender neutral measures.

⁷¹ Another argument on the proportionality point is that there is some evidence that the quotas that have been used by German states have only had a limited impact on the problem of under representation: see Schiek above, p 149; Schiek, 'Positive action in community law' (1996) ILJ 239 and Shaw J, above, p 397.

⁷² The argument that reverse discrimination should only be used as a last resort has also been made by several commentators: see McCrudden C, above, p 242 and Pitt G, above, p 286.

⁷³ In para 9 of the judgment the ECJ held: "The national court considers that the quota system is compatible with the German constitutional and statutory provisions referred to in paragraph 6 above. More specifically, it points out that para 4 of the LGG must be interpreted in accordance with the Grundgesetz with the effect that, even if priority for promotion is to be given in principle to women, exceptions must be made in appropriate cases."

Opinion, the savings clause merely displaces the rule giving priority to women in certain cases, it does not alter the discriminatory nature of the rule in general.

Third, it is not clear that the savings clause has any real application. According to the Advocate General, the Land observed that the traditional secondary criteria of service and number of dependants could come within the scope of the proviso. However, as the Advocate General pointed out, these criteria are potentially indirectly discriminatory and the ECJ made it clear in its judgment that the savings clause could not be used to introduce discriminatory criteria.⁷⁴ The candidates must already be of equal merit for the quota rule to apply and, therefore, no factors relating to their ability to do the job could be used. Two factors which have been suggested by some commentators are race and disability.⁷⁵ However, many Member States have legislation dealing with race and disability discrimination and it is likely that the use of these characteristics in selection or promotion decisions will already be covered by that legislation. For example, under domestic law it would be unlawful to prefer a male candidate over a female candidate because of his race although it would be lawful to select a male candidate on the ground of his disability.

Given the limited scope for the practical application of the savings clause, it is difficult to see why its presence should make the difference between a quota rule being lawful or unlawful under article 2(4). One possibility is that the ECJ was unwilling to continue to block the use of quotas and therefore it used the presence of the savings clause in *Marschall* to reverse its previous decision in *Kalanke* but without appearing to do so. Another possibility is that the vagueness of the savings clause gives the quota rule a political acceptability that was lacking in the so called automatic quota rejected by the ECJ in the *Kalanke* case.⁷⁶ The *Marschall* case is not the end of the road. There is a third German quota case currently pending before the ECJ in the form of the *Badeck* case.

⁷⁴ Schiek has argued that there is still a way in which the traditional selection criteria could have an impact on selection decisions. Because prior to the introduction of the quota system it was possible for civil servants to predict with a reasonable degree of certainty how long it was likely to be before they were promoted, some civil servants have budgeted their expenditure on this basis. The introduction of the quota system inevitably means that some male civil servants will have to wait longer for promotion and, as a result, they may encounter financial difficulties. Schiek suggests that this financial hardship could be taken into account as a relevant criterion under the savings clause. The problem with this argument is that because the financial hardship is mainly going to affect men the criterion is potentially indirectly discriminatory and it is difficult to see how it can be justified: see Schiek D, above, p 156.

⁷⁵ See Shaw J, above, p 405 (race) and Schiek D, (1998), above, p 156 (disability).

⁷⁶ Charpentier L, above, at p 184.

Under review are strict quotas for trainee academic positions and a requirement that every second interview candidate must be female.⁷⁷ Hopefully, the ECJ will take this opportunity to clarify the exact scope of article 2(4) in relation to promotion and selection decisions.

Finally, it is worth noting the provisions of sub-article (4) which was inserted into Article 141 by the Amsterdam Treaty with effect from 1 May 1999.

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The new sub-article is substantially the same as Article 6(3) of the Agreement on Social Policy concluded between all the Member States of the European Union other than the United Kingdom and annexed to the Maastricht Treaty on European Union with protocol No 14. The main difference is that Article 6(3) only refers to women while the new Article 141(4) refers to the under represented sex and therefore allows positive action measures in favour of men. It remains to be seen whether the ECJ will interpret Article 141(4) in the same way as article 2(4) of the ETD or whether it will give it a wider application.⁷⁸

Domestic Law

In contrast with the European position, the domestic provisions on positive action are extremely precise although they are also much more limited. In particular, there is no scope whatsoever for any form of reverse discrimination in appointments. As a result, the kind of quotas that were used in *Kalanke* and *Marschall* would be unlawful in the UK. Instead, the main focus of the domestic provisions is outreach programmes. Sections 47 and 48 of the SDA permit employers and trainers⁷⁹ to take two forms of action in circumstances where one sex is under represented in relation to a particular kind

⁷⁷ Case C-158/97: Schiek D, (1998), above, at p 153.

⁷⁸ Arguably, the fact that Member States are given the ability to compensate for disadvantage means that Article 141(4) is intended to have a wider scope than article 2(4). Although, see paragraph 21 of the Opinion of the Advocate General in the *Kalanke* case in which he argues that the same restrictions which apply to article 2(4) of the ETD should also apply to Article 6(3).

⁷⁹ The requirement that the training had to be provided by a designated body was removed by SDA 1986, s 4. The training can now be provided by "any person".

of work.⁸⁰ The first form of action is the provision of training that would help to fit the trainees or employees for the particular kind of work in respect of which their sex is under represented. Training is defined in s 82 as any form of education or instruction although apprenticeships are expressly excluded because they are deemed to be a form of employment.⁸¹

The second form of action is encouraging members of one sex to take advantage of opportunities for doing that work in respect of which they are under represented. This could encompass adding words to advertisements that indicate applications from members of one sex are particularly welcomed. Another possibility is advertising in papers that are aimed at one sex or circulating lists of vacancies to organisations providing single sex training or having single sex open days. It could also cover organising access courses to encourage one sex to take up training courses. In relation to existing employees, employers could encourage employees of one sex to apply for jobs either by informal encouragement or by sending them details of suitable vacancies. However, this form of action is limited to encouraging applicants to apply for jobs, it does not extend to providing job opportunities.⁸²

The extent to which the positive action provisions in the SDA have been used by trainers and employers in the public sector has been studied by Sacks.⁸³ In relation to trainers, her research project looked at the range of single sex courses available and matters relating to the accessibility of the courses eg the existence of child care facilities, age limits, fees etc, rather than how many public sectors trainers provide single sex training.⁸⁴ Her research revealed that courses offered by colleges of further education tended to be within a narrow range and concentrated on information technology,

⁸⁰ Under representation exists where it reasonably appears to the person discriminating that at any time within the 12 months immediately preceding the doing of the act there were no persons of the sex in question doing that work in Great Britain (or a particular area of Great Britain) or the number of persons of that sex doing the work was comparatively small: see s 47 (1) and (2).

⁸¹ Employment is defined as employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour: s 82. For the difference between a training contract and an employment contract see: *Wiltshire Police Authority v. Wynn* [1980] ICR 401, CA and *Daley v. Allied Suppliers Ltd* [1983] ICR 90, EAT.

⁸² See *Hughes v. London Borough of Hackney*, EOR No 7, (1986) p 27, IT, a case on the parallel provisions in the Race Relations Act 1976.

⁸³ Sacks V, 'Tackling Discrimination Positively in Britain' in *Discrimination: the limits of the law*, Hepple B and Szyszczak E eds, (1992). The study was concluded in August 1989.

⁸⁴ Her study considered 60 training bodies that offered single sex training. Presumably her decision not to study how many public sector trainers provide single sex training implies that there it is a relatively frequent occurrence although she does indicate that the coverage is not comprehensive: p 371.

electronics and management training. A much wider range of courses was offered by women's skills centres which generally provided training for traditionally male trades.

In relation to s 48, the study looked at the civil service, the NHS and twelve local authorities. She found "little evidence of positive efforts to train women in the Civil Service" and the training that was available was limited to management training. Most of the local authorities surveyed offered some single sex training although in several cases this was limited to assertiveness training which, on its own, is of doubtful legality as it is not training for particular work. In general, "councils are more interested in schemes which will alleviate their employees shortages by keeping women in their present jobs than in developing their workforce's potential."⁸⁵ With regard to the NHS, guidance from the Department of Health on changing the employment profile of the Service and increasing career opportunities for women contained little about women only training and "enquiries made from a small number of authorities showed little knowledge of such possibilities".⁸⁶ In general, Sacks found that employers and trainers seemed to be unaware of the limitations in the SDA. In particular, a significant number of the organisations researched were either totally unaware of the requirement for statistical evidence of under representation or somewhat hazy as to the precise conditions.⁸⁷

Finally, the SDA has one example of using facially neutral criteria in order to increase the proportion of an under represented sex. Section 47(3) provides that any person can provide training to people who are in special need of training because they have been "discharging domestic or family responsibilities to the exclusion of regular full time employment". This section is aimed at women who have taken time off work in order to in order to care for children but it uses as its criterion something that can apply to both sexes. As result, the section provides a defence to claim of indirect discrimination rather than direct discrimination.

⁸⁵ Sacks V, above, p 373.

⁸⁶ Sacks V, above, p 375.

⁸⁷ It seems that employers are more likely to use the positive action provisions in the RRA: see the guide produced by the CRE, *Positive action and equal opportunity in employment*, (1991).

MATERNITY AND PREGNANCY

Introduction

Both the EPA and the SDA contain derogations for pregnancy and maternity. Section 6(1)(b) of the EPA states that an equality clause shall not operate in relation to terms “affording special treatment to women in connection with pregnancy or childbirth”. Materially the same wording is used in the derogation in s 2(2) of the SDA. There is no derogation for pregnancy or maternity in Article 141 although the ETD does have a derogation that is contained in article 2(3) and which states: “This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.” The fact that there is an exception in the EPA but not Article 141 probably reflects the difference in scope between the two provisions. The EPA covers all contractual benefits while Article 141 covers contractual and non-contractual remuneration. For example, a contractual right to annual leave would be covered by the EPA but not Article 141. The Community legislators appear to have reasoned that any special treatment needed to protect women in relation to pregnancy or maternity would arise in the context of treatment rather than pay.

The one obvious area of variance between the ETD derogation and the domestic derogations is the fact that the ETD uses the word maternity while the EPA uses the word childbirth. Childbirth means the process of giving birth to a child and, therefore, on a literal interpretation it only has a limited temporal application. Maternity, on the other hand, means “the quality or condition of being a mother”, a much wider concept with a much greater temporal application.⁸⁸ In practice, the difference in language is not significant as the domestic exceptions were clearly intended to extend beyond the point of actually giving birth and to cover at least the initial states of motherhood while the exception in the ETD has been interpreted as having a reasonably restricted application time wise.

A derogation for pregnancy and maternity can potentially provide a defence to claims of both direct and indirect sex discrimination depending on whether the treatment in question is more or less favourable for the women. Where a woman is subjected to less favourable treatment because she is pregnant or on maternity leave eg dismissal, her

treatment is based on the fact that she has a unique sex difference. The case law indicates that detrimental treatment on this ground can give rise to a claim of direct sex discrimination.⁸⁹ Where a woman is afforded more favourable treatment eg additional annual leave the detriment is suffered by those employees who are not pregnant or on maternity leave. The states of not being pregnant or not being on maternity leave are both distribution sex characteristics in that they apply to some women and all men. As a result, more favourable treatment for pregnancy and maternity gives rise to a claim of indirect rather than direct discrimination. In this context, therefore, the derogation operates by removing from employers the need to justify the difference in treatment. As beneficial and detrimental treatment give rise to different forms of discrimination, it is helpful to consider the two forms of treatment separately.

More favourable treatment

There is a singular lack of case law on the scope for more favourable treatment under the domestic derogations. However, there are several cases that look at the scope of article 2(3). The ECJ first considered the issue in the case of *Re Italian sex equality laws: EC Commission v Italy*.⁹⁰ The case concerned, amongst other things, the grant of adoption leave. Under the relevant Italian provisions, women who have adopted a child or obtained custody of a child with a view to adoption are entitled to three months maternity leave including the financial benefits relating thereto as long as the child is under 6 years of age. However, the adoptive father is not given the same right. The Advocate General rejected the argument that the provision came within the scope of article 2(3) on the basis that “leave after adoption benefits the child above all in so far as it is intended to foster the emotional ties necessary to settle the child in the family adopting it.” However, the ECJ disagreed with this analysis and held that adoption leave does come within the scope of the derogation.

⁸⁸ The Oxford English Dictionary, (second edition).

⁸⁹ See the discussion on this point in chapter 2.

⁹⁰ [1984] 3 CMLR 169, ECJ.

[T]he adoptive father does not have the right given to the adoptive mother of maternity leave for the first three months following the actual entry of the child into the adoptive family. That distinction is justified, as the Government of the Italian Republic rightly contends, by the legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a newborn child in the family during the very delicate initial period.

The fact that the ECJ was willing to apply article 2(3) to adoption leave for children under the age of six years of age is the clearest indication to date of the fact that the derogation extends beyond a narrow interpretation of maternity and into the wider sphere of motherhood.

The ECJ applied a similar analysis in the case of *Hofmann v. Barmer Ersatzkasse*.⁹¹ German legislation prevented the employment of women for a protective period of eight weeks following childbirth. At the end of the eight weeks and until the child was six months old women were entitled to a further period of maternity leave during which they were paid an allowance funded by the State. In this case the parents agreed that at the end of the protective period the father would take unpaid leave from work in order to remain at home with the child and the mother would return to work. The father's claim for maternity allowance was refused on the basis that the allowance was only payable to working mothers.

The father argued that the primary purpose of the further period of maternity leave was childcare and not to protect the health of the mother. As a result, the refusal to pay him a maternity allowance was outside the scope of the derogation contained in article 2(3) of the ETD. The Commission argued that the derogation in article 2(3) should have a restrictive interpretation and should only apply to provisions that are objectively necessary for the protection of the mother. The ECJ rejected a narrow interpretation of the derogation and held that its purpose is to protect a woman in two respects. First, to protect her biological condition both during pregnancy and after. Second, to protect the special relationship between a woman and her child in the period that follows childbirth. On this basis the ECJ held that the German provisions were within the scope of the derogation.⁹² In *Hoffmann* the period of maternity leave was six months after the birth of the child. The question that remains unanswered by this and

⁹¹ [1986] 1 CMLR 242, ECJ.

⁹² Despite winning the case Germany subsequently opened the further period of maternity leave to both sexes: Docksey C, 'The principle of equality between women and men as a fundamental rights under

any other case is what further period of leave, if any, is covered by article 2(3).

On the other hand, the derogation does not extend beyond allowing women an initial period of time in which to bond with their newborn or adopted child. For example, it does not extend to giving women time off work in order to facilitate their childcare role. The ECJ made this clear in the case of *Re Protection of Women: EC Commission v France*.⁹³ The French Government sought to argue that the following rights were covered by article 2(3): a reduction in working hours for women aged 59, time off for sick children, additional holiday, a day off on the first day of the school term, some hours off on Mothers' Day, daily breaks for women working on computer equipment or as typists or switchboard operators, the grant of bonuses from the birth of the second child for pension calculation and the payment of allowances for the cost of childcare. The ECJ repeated its finding in *Hoffmann* that the derogation is concerned with protecting the special relationship between a woman and her child over the period that follows pregnancy and maternity. With regard to the particular rights granted by the French legislation the ECJ held that they were not covered by article 2(3). As the Court pointed out, "the particular rights which are kept in force sometimes aim to protect women in their capacity as aged workers or as parents, although male workers can be in these positions as well as female workers".

As the ECJ indicated in the *Hoffmann* case there are two separate rationales for granting women more favourable treatment on the grounds of pregnancy and maternity. The first rationale is that more favourable treatment may be necessary to protect the health and safety of the woman and child. Thus, a period of maternity leave can be explained on this basis. A similar idea underlies some of the provisions of the Pregnancy Directive (92/85/EEC) including, for example, the right of a pregnant woman to be suspended from work on full pay if she is unable to perform her job on health and safety grounds (art 5). The second and more contentious rationale is that there is a special relationship between a mother and her child that requires protection. It is this rationale which underlies the extended period of maternity leave. The idea that the relationship between a mother and her child warrants more favourable treatment for women can be

Community law' (1991) 20 ILJ 258 at 272.

⁹³ [1989] 1 CMLR 408, ECJ.

criticised on a number of grounds.⁹⁴ First, it perpetuates the existing gender stereotype that women have the primary responsibility for looking after the baby. Second, by giving these rights to women only it makes it more difficult for men to share the childcare role with women. Third, it makes women more expensive to employ thereby creating a potential disincentive to female employment.

Less favourable treatment

The extent to which the domestic derogation under the EPA allows for detrimental treatment on the ground of pregnancy or childbirth was considered by the tribunal in the case of *Coyne v. Exports Credits Guarantee Department*.⁹⁵ Under the terms of her civil service contract the applicant was entitled to three months maternity leave on full pay. At the end of her maternity leave she was certified as not fit for work for a reason connected with her confinement for a period of two weeks and two days. Thereafter, she took a period of unpaid leave before returning to work. The respondent's sick pay scheme provided that all staff were entitled to a period of six months sick pay on full leave in any period of twelve months but that any maternity leave on full pay was to be set-off against this entitlement. Furthermore, the sick pay rules provided that women were only entitled to sick leave following maternity leave if the illness was unconnected with the confinement. As a result, the applicant was refused sick pay for her sickness absence following her return from maternity leave. At the tribunal the respondent argued that the case was covered by the maternity derogation in s 6(1)(b) of the EPA. The tribunal rejected this argument and held that the expression 'special treatment' should be construed as meaning specially favourable treatment and not in its wider meaning of favourable or unfavourable treatment.⁹⁶ Thus, it appears that the EPA exception does not allow for any less favourable treatment on the ground of pregnancy or maternity.

The position under the SDA and article 2(3) appears to be slightly different in that

⁹⁴ See for example Fredman S, 'A difference with distinction: pregnancy and parenthood reassessed' (1994) 110 LQR 106 at 120.

⁹⁵ [1981] IRLR 51, IT.

⁹⁶ The tribunal was persuaded by the argument that if the exception covered unfavourable treatment an employer would be entitled to put a clause in a woman's contract providing that if she became pregnant her pay could be cut by 50% and the EPA would be powerless to prevent that. Not surprisingly given the year of the decision, the tribunal does not appear to have considered the possibility that such a cut would be contrary to Article 141.

employers can rely on the derogations as a defence to imposing detrimental treatment as long as the aim is to protect the health and safety of the mother or child. There are two situations in particular where the ECJ has held that article 2(3) can cover detrimental treatment. The first is a prohibition on night work and the second is compulsory maternity leave. The issue of night work arose in the case of *Habermann-Beltermann v. Arbeiterwohlfahrt*.⁹⁷ The applicant was employed as a night nurse in a home for the elderly. Shortly after she was employed it became apparent that she was pregnant. German law prohibited night work for pregnant or breast feeding women. The applicant's employment was terminated on the basis that contravention of the law rendered the contract of employment void. Without any analysis whatsoever, the ECJ held that the prohibition on night work was "unquestionably compatible with Article 2(3)". The Court then went on to consider whether the termination of employment was contrary to the Directive.

As the Court has held (see *Hoffmann* judgment cited above, paragraph 27), the Directive leaves Member States with a discretion as to the social measures which must be adopted in order to guarantee, within the framework laid down by the Directive, the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment.

In this case, the questions submitted for a ruling relate to a contract without a fixed term and the prohibition on night-time work by pregnant women therefore takes effect only for a limited period in relation to the total length of the contract.

In the circumstances, to acknowledge that the contract may be held to be invalid or be avoided because of the temporary inability of the pregnant employee to perform the night-time work for which she was engaged would be contrary to the objective of protecting such persons pursued by Article 2(3) of the Directive, and would deprive the Directive of its effectiveness.⁹⁸ (paras 22 to 24)

In other words, a prohibition on night work was lawful because it was necessary to protect the health and safety of the mother and child. However, the termination of the woman's employment was unlawful because its purpose was to benefit the employer

⁹⁷ [1994] IRLR 364, ECJ.

⁹⁸ The explicit reference to the fact that the applicant was employed on a contract without a fixed term means that the ECJ left open the possibility that it could be within the scope of article 2(3) to dismiss a woman on a fixed term in similar circumstances if the period of her unavailability for work either wholly or substantially corresponds with the term of her contract. On the question of whether the nature of the employment relationship can affect the application of the ETD see the discussion of the *Webb* case in chapter 5.

rather than protect the mother.⁹⁹

The second way in which a woman can be subjected to less favourable treatment is that she can be forced to take a period of time off work around the time of the birth. It is not clear how long this period is but if the issue is ever tested the courts are likely to follow the provisions of the Pregnancy Directive which stipulates that a woman must take at least two weeks of maternity leave around the date of confinement (art 8).¹⁰⁰ Where a woman remains on full pay it may not be much of a detriment to have to take time off work. However, if the absence is unpaid the detriment is much more severe. The issue of compulsory maternity leave was touched upon by the ECJ in the case of *Hertz v Dansk*.¹⁰¹ The point was not strictly relevant to the issues in the case which was concerned with the treatment of pregnancy related illness once the period of maternity leave has expired. In paragraph 15 of the judgment the ECJ made the following comment: "It is a matter for each Member State to fix the period of maternity leave in such a way as to allow female workers to be absent during the period during which problems due to pregnancy and confinement may arise."

Despite the reference to allowing women to be absent the comment was subsequently relied upon by the ECJ in the case of *Boyle v EOC*¹⁰² as a basis for finding not only that women can be obliged to take a period of maternity leave but that employers can use the maternity leave period in order to avoid paying the woman sick pay. *Boyle* was a test case brought by several employees of the EOC in order to clarify various outstanding issues in relation to maternity rights. One of the questions referred to the ECJ was the compatibility of s 72(1)(b) of the ERA 1996 with the ETD. Under this section, a woman's maternity leave automatically starts if she is absent from work for a pregnancy related illness in the six weeks before the expected week of childbirth. The ECJ referred to its earlier comment in *Hertz* and then held:

National legislation may therefore, as here, provide that the period of maternity leave commences with the date notified by the person concerned to her employer as the date on which she intends to commence her period of absence, or the first

⁹⁹ The German law in question also prevented pregnant or breastfeeding women from doing overtime or working on Sundays or public holidays. However, the ECJ did not comment on whether these measures were within the scope of article 2(3).

¹⁰⁰ The provision had been implemented into domestic law by the Maternity (Compulsory Leave) Regulations 1994 SI 2497 reg 2.

¹⁰¹ [1991] IRLR 31, ECJ.

¹⁰² [1998] IRLR 717, ECJ.

day after the beginning of the sixth week preceding the expected week of childbirth during which the employee is wholly or partly absent because of pregnancy, should that day fall on an earlier date.

In other words, article 2(3) not only allows for a degree of compulsory maternity leave but also permits employers to determine when the leave is taken. There can be little doubt that a minimum period of maternity leave is necessary to protect the health of the mother and child. What is less obvious is the health and safety benefits of forcing a woman to start her maternity leave if she is absent from work for a pregnancy related illness in the six weeks before her expected week of confinement. The impact of this decision is not to protect the mother but to save money for the employer as it prevents a woman from collecting sick pay in those six weeks. A protective measure would be to allow the woman to collect her sick pay and then take her full period of maternity leave afterwards. Thus, in this particular case the ECJ appears to have extended the scope of article 2(3) to cover less favourable treatment for which the only rationale is the financial interests of the employer. In relation to what other less favourable treatment is necessary in order to protect the health and safety of the mother and child, the courts are likely to be influenced by the provisions of the Pregnancy Directive. As a result, if an employer can show that a particular measure comes within the scope of the Pregnancy Directive, the courts are unlikely to find that it falls outside the scope of article 2(3).

One area where article 2(3) does not apply is in relation to dangers that also affect men. This point was made clear by the ECJ in the case of *Johnston v Chief Constable of the Royal Ulster Constabulary*.¹⁰³ This is the case in which the Chief Constable of the RUC decided that women police officers in Northern Ireland should not be armed because of fears that they might be attacked and their firearms stolen, to maintain the position of women officers in the community and to maintain, as far as the women officers were concerned, the ideal of an unarmed police force. Because of their unarmed status, women were unable to undertake security duties. This resulted in the decision to terminate the applicant's employment contract. The respondent argued, inter alia, that the termination of the applicant's employment was covered by article 2(3). The ECJ disagreed and held that the derogation had to be interpreted strictly.

It is clear from the express reference to pregnancy and maternity that the directive is intended to protect a woman's biological conditions and the special relationship

¹⁰³ [1986] 3 CMLR 240 ECJ.

which exists between a woman and her child. That provision of the directive does not therefore allow women to be excluded from a certain type of employment on the ground that public opinion demands that women be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned.

Finally, there is the question of whether article 2(3) applies to situation where there are risks specific to women that are not pregnancy or maternity related. The use of the word 'particularly' implies that the article has a wider application. In practice, it is rather difficult to think of anything other than a somewhat improbable situation where women face a risk that is not also applicable to men. One possible scenario is a high security prison holding offenders convicted of crimes against women where there is a real risk of a woman but not a man being assaulted. If an employer can show that there genuinely is a risk that is specific to women and not just a situation where public opinion demands that women should be afforded a greater degree of protection, the ECJ may be willing to find that article 2(3) applies.

OCCUPATIONAL PENSION SCHEMES

Introduction

There has traditionally been a considerable amount of direct sex discrimination in occupational pension schemes both in relation to scheme access and benefits.¹⁰⁴ Although the Government accepted that pensions were pay when the EPA was first passed in 1970, pensions were excluded from the scope of the Act (s 6(1)).¹⁰⁵ Separate legislation was subsequently introduced to deal with direct discrimination in access conditions but not indirect discrimination such as the exclusion of part-time employees.¹⁰⁶ The main effect of the legislation was to equalise entry ages for women

¹⁰⁴ For an introduction to pensions generally see Seres J, *Pensions: A practical guide* (1992) and Hosking's and Escolme et al, *Pension schemes and retirement benefits*, (1991).

¹⁰⁵ For the reasons for the exclusion see: Secretary of State for Employment, Barbara Castle, Hansard, HC Vol. 795, col. 923, 9 February 1970 and HC Vol. 800, col. 740, 23 April 1970

¹⁰⁶ The equal access requirements in ss 53-56 of the Social Security Pensions Act 1975 ensured that membership of a scheme was open to women and men on the same terms as regards age and length and service (s 53(2)). Regulations made under s.53 proscribed that eligibility criteria must be the same whether they are contained within the scheme rules or the contract of employment: Occupational Pension Scheme (Equal Access to Membership) Regulations 1976 SI 1976/142. Section 6(1) of the EPA was replaced with a new s 6(1A) that required compliance with the equal access requirements.

and men.¹⁰⁷

Initially, Article 141 was thought to have only a marginal effect on occupational pensions.¹⁰⁸ As a result, a separate body of legislation was put in place in order to apply the principle of equal treatment to occupational pensions schemes. In particular, in 1986 the EC agreed Directive 86/278 on the implementation of equal treatment for women and men in occupational social security schemes (OSSD). The OSSD covers any scheme (other than one which is covered by the provisions of the Social Security Directive 79/7) whose purpose is to provide protection against certain risks including sickness, invalidity, old age and early retirement as long as the benefit constitutes consideration paid by the employer to the worker by reason of his or her employment (arts 2 and 4). On the face of it the Directive is very wide in that it prohibits direct and indirect discrimination in relation to the obligation to contribute, conditions of access, the calculation of contributions and the calculation of benefits (art 5). However, in its original form the Directive also contained an extensive list of exceptions and temporal restrictions. In particular, there were exceptions for pensionable age, survivors' benefits (art 9) and actuarial factors (art 6). However, there was no exception in the Directive for bridging pensions.

The provisions of the OSSD (including all of the exceptions) were due to be implemented into domestic law by s 23 and schedule 5 of the Social Security Act 1989. The deadline under the OSSD for bringing schedule 5 into force was 1 January 1993. However, schedule 5 was never implemented because of the uncertainty caused by the *Barber* cases.¹⁰⁹ The *Barber* cases were a series of cases dealing with the applicability of Article 141 to occupational pension schemes. The scope of Article 141 is not restricted by the provisions of the OSSD and, therefore, the derogations in the OSSD are ineffective where the benefit in question is covered by Article 141.¹¹⁰ In the *Barber* cases the ECJ looked at the derogations and determined whether or not they were contrary to

¹⁰⁷ Seres J, above, p 322.

¹⁰⁸ See for example, the preamble to Directive 86/278 on the implementation of equal treatment for women and men in occupational social security schemes.

¹⁰⁹ See the written answer given by Ann Widdecombe, Under Secretary of State for Social Security to the House of Commons on 10 December 1992 as reported in NAPF Parliamentary Bulletin No. 10 April 1993, p. 1.

¹¹⁰ *Moroni v. Firma Collo GmbH* [1994] IRLR 130 para 24 and *Bestuur v. Beune* [1995] IRLR 103 para 65.

Article 141.¹¹¹ The outcome of the *Barber* cases was that two of the exceptions in the OSSD, namely pensionable age¹¹² and survivors' benefits¹¹³ were held to be contrary to Article 141 and the exception for actuarial factors was found to be partially in contravention.¹¹⁴ In addition, the use of bridging pensions was held to be consistent with Article 141 despite the fact that the use of bridging pensions was not covered by an exception in the OSSD.¹¹⁵

In order to bring the OSSD in line with Article 141 the member states adopted an amending directive (96/97/EC). The exceptions for pensionable age¹¹⁶ and survivors' pensions previously contained in article 9(a) were removed (art 2 of the amending directive). In addition, the exception for actuarial factors was amended and an additional exception for bridging pensions inserted into the Directive. The end result is that there are currently only two legislative exceptions in the area of occupational pensions namely bridging pensions and actuarial factors. The scope and rationale of the two exceptions is discussed in more detail below.

¹¹¹ For the impact of the *Barber* cases see: Arnall A, 'Sex discrimination in occupational pension schemes' (1986) 11 ELR 363; IRLB, 'Sex equality in occupational pensions', No 508 p.2; Anon, 'Equality in occupational pension schemes: still waiting for Coloroll' (1994) 23 ILJ 155; Honeyball S and Shaw J, 'Sex, law and the retiring man' (1991) 16 ELR 47; Hudson D, 'Some reflections on the implications of the Barber decision' (1992) 17 ELR 163; Deakin S, 'Equality in pensions law - the limits of Barber' (1994) 53 CLJ 236; EOR, 'Sex equality and occupational pensions - Barber five years on', 1995, No 62, p 15; Moore S, 'Justice doesn't mean a free lunch: the application of the principle of equal pay to occupational pension schemes' (1995) 20 ELR 159; Grant M, 'Judgment day', *Pensions World*, November 1994, p 2; NAPF, *Parliamentary Bulletin No 17*, October 1994 and Ellis E, *EC Sex equality law*, (1998), p 69. To the extent that recent developments have actually had an impact on pensions equality see: Whiteford E, 'From non-discrimination to equality: pensions and EC law' in Dashwood A and O'Leary S, eds, *The principle of equal treatment in EC law*, (1997).

¹¹² *Barber v Guardian Royal Exchange Assurance Group* [1990] IRLR 240, ECJ. See also *Moroni v Firma Collo GmbH* [1994] IRLR 130, ECJ. However, the ECJ applied a temporal restriction to the judgment so that pensionable age only has to be equalised for periods of pensionable service after the date of the *Barber* judgment ie 17 May 1990: *Ten Oever v Stichting* [1993] IRLR 601, ECJ. See also Protocol 2 to the Treaty on European Union which incorporates the temporal restriction into Article 141. The potential effects of *Barber* were limited even further by the ECJ's decision in *Smith v. Avdel Systems Ltd* [1994] IRLR 602, that the requirement to level-up benefits only applies until such time as the rules of the scheme are equalised.

¹¹³ *Ten Oever v. Stichting* [1993] IRLR 601, ECJ. The *Barber* limitation on retrospective effect also applies to survivors' and dependants' benefits and therefore schemes are only required to provide equal dependants' pensions for periods of service after 17 May 1990: see *Coloroll* above, paras 51-60. For some of the earlier cases on survivors' benefits see: Szysczak E, 'Equality, survivor's benefits and occupational pension schemes' (1988) 51 MLR 355

¹¹⁴ *Neath v. Hugh Steeper Ltd* [1994] All ER 929, ECJ, *Coloroll Pension Trustees Ltd v. Russell* [1994] IRLR 586, ECJ.

¹¹⁵ *Birds Eye Walls Ltd v. Roberts* [1994] IRLR 29, ECJ. For industry reaction to this case see: 'Surprise ruling on pensions bias' *Financial Times*, 23 December 1993.

¹¹⁶ In line with the temporal restriction applied by the ECJ the change only applies to periods of service after 17 May 1990.

Bridging pensions

The European exception for bridging pensions is contained in article 2 of the amended OSSD which reads as follows:

This Directive does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount of benefit paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

The exception has been implemented into domestic law in substantially the same form by ss 62-66 of the Pensions Act 1995 and reg 13 of the Occupational Pension Schemes (Equal Treatment Regulations) 1995.¹¹⁷

The rationale behind the exception for bridging pensions is clearly stated in article 2. The difference in state pensionable age means that women are entitled to a state pension at the age of 60 while men have to wait until they are 65. The use of bridging pensions is an attempt by employers and pension schemes to compensate men for the direct discrimination in the state scheme. The result of the exception is that in terms of overall pension (state and occupational combined) women and men receive the same albeit between the ages of 60 and 64 women receive a lower occupational pension than men.¹¹⁸

Single sex actuarial factors

The difference between a pension and most other savings schemes is that a pension guarantees the scheme member a regular income for the rest of his or her life. Obviously, the longer a member lives the more expensive the pension becomes for the pension provider. At the age of 60 average life expectancy is 18 years for a man and 22

¹¹⁷ SI 1995/3183. The Regulations came into force on 1 January 1996.

¹¹⁸ The other way of dealing with the difference in state pensionable age is to integrate the occupational scheme with the state scheme so that the flat rate pension is ignored for the purpose of calculating benefits. For example, a member entitled to 2/3rds of his or her final salary on retirement will actually receive from the scheme 2/3rds of final salary minus the flat rate state pension payable at any particular time. Because of the difference in the state pensionable age the state pension is deducted from a man's

years for a woman.¹¹⁹ Thus, if they both retire at the age of 60 the average woman will receive her pension for four years longer than the average man. Despite the fact that single sex actuarial factors involve the application of a sex stereotype, the OSSD and domestic law¹²⁰ permit their use in the following three situations.

First, in relation to final salary schemes, it is *not* permissible to pay women a lower periodic pension than men (except where a member takes early or late retirement¹²¹) or to require women to make higher pension contributions. However, it is lawful to discriminate between the sexes in relation to the payment of capital sums, in particular the conversion of part of a periodic payment into a capital sum, transfer payments and a reversionary pension payable to a dependent in return for the surrender of part of a pension (art 6(1)(h)).¹²² What does this mean in practice? In addition to a periodic pension, a member of a final salary scheme often has the right to commute part of his or her periodic pension into a lump sum. Depending on the age at which the lump sum is taken a different multiple is applied to the amount of the annual pension that is surrendered. Typically, for each £1 of pension surrendered by a woman at the age of 60 a multiple of 11 is applied while for each £1 surrendered by a man at the age of 65 a multiple of 9 is used.¹²³ In most schemes, different multiples are used for women and men. This means that a woman with exactly the same periodic pension entitlement as a man will receive a greater lump sum payment. However, not all schemes use different multiples for women and men. Some schemes use the same multiples for women and men and no account is taken of the longer life expectancy of women.¹²⁴

The exception for capital sums also has an effect on transfer payments and buy-outs. A member of a final salary scheme who leaves the service of his or her employer before retirement may wish to transfer his or her pension benefits to another scheme.¹²⁵

occupational pension from the age of 65 and from a woman's occupational pension from the age of 60.

¹¹⁹ ONS, *English Life Tables No 15*, (1997). At 65 the difference in life expectancy is also four years.

¹²⁰ Pensions Act 1995 ss 62-66 and the Occupational Pension Schemes (Equal Treatment Regulations) 1995, SI 1995/3183, reg 15.

¹²¹ In this situation the periodic pension is subject to an actuarial adjustment in order to compensate for the early or late payment of benefits.

¹²² Employers can also make different levels of contributions to final salary schemes in order to ensure the adequacy of the funds (article 6(1)(i)). However, as this does not have any impact on the benefit that the individual receives it is questionable whether this would be discriminatory in the first place.

¹²³ Curtin D, 'Occupational pension schemes and Article 141: beyond the fringe?' (1987) 24 CML Rev 215, at 220, note 19.

¹²⁴ For example, see rule 18 of the British Gas Staff Pension Scheme.

¹²⁵ The right to a transfer payment was introduced by Pt II of Sched 1 of the Social Security Act 1985

For an individual member transferring the amount of the transfer payment is usually calculated by reference to the capital value of the deferred pension to which the member is entitled on leaving service. The receiving scheme will then use the transfer payment to give the member either additional years of notional service in the new scheme or a deferred pension. In determining the capital value of the deferred pension account is taken of the different life expectancy of the sexes with the result that women's transfer payments are higher than men's. However, it should be noted that unlike a lump sum payment which is money a member can actually spend, a transfer payment is only used to purchase benefits in another scheme. Since most schemes use similar mortality tables, a woman needs a higher transfer payment in order to purchase the same benefits as a man with the same number of years of service and the same final salary. As a result, the fact that a woman has a larger transfer payment will not always mean that she receives a higher level of benefits from a receiving scheme.

As an alternative to transferring to another occupational scheme a member may choose to use his or her pension rights to purchase an annuity contract with an insurance company. This option is often referred to as a buy-out.¹²⁶ The amount of the buy-out is the cash equivalent of the member's accrued rights. Again, in determining the amount of the cash equivalent the use of actuarial factors results in greater transfer payments for women but not necessarily a higher level of benefit from the receiving scheme. This will depend on whether the insurance company uses single sex or unisex multiples.¹²⁷ If the company does use single sex multiples the results can be quite dramatic. For example, as at 6 May 1999, Standard Life annuity rates for a lump sum of £10,000 were £892 for a man aged 65 and £741 for a woman of the same age.¹²⁸ In other words, for the same lump sum women receive only 84% of the periodic pension paid to men.

The second exception deals with the use of actuarial factors in the payment of benefits by a money purchase scheme (art 6(1)(h)). In a money purchase scheme the contributions are invested by the pension scheme in order to build up a fund that is

amending paras 11-13 of Sched 1A of the Social Security Pensions Act 1975 for members leaving service after 1 January 1986.

¹²⁶ The right to a buy-out was introduced for members leaving service after 1 January 1986, see above.

¹²⁷ Under s 45 of the SDA, insurance companies are allowed to use single sex actuarial factors in any insurance policy as long as it is reasonable to rely on the data. For a criticism of the use of single sex actuarial factors in insurance contracts see Khan K, 'Sexual discrimination in insurance' (1986) 137 NLJ 839.

personal to the member. On retirement the member may elect to take some of the fund as a lump sum payment. Unlike the position with final salary schemes, the lump sum is the same for women and men and will depend entirely on the size of the fund. (The same is true if the member makes a transfers payment to another scheme prior to his or her retirement.) The remainder of the money in the scheme must be used to buy an annuity contract, either with the same or another pension provider. As with buy-outs, if the company uses single sex factors the result is that the same lump sum gives women a lower periodic payment than men.

The third exception allows employers to make different levels of contributions to money purchase schemes but only if the aim is to equalise the amount of the final benefits. In other words, employers can make higher contributions for women members on the basis that they need a bigger fund in order to buy the same level of periodic pension (art 6(1)(i)).

What would be the effect of using single sex actuarial factors in the calculation of benefits?¹²⁹ In theory, the result should be an averaging out of benefits so that, for example, in purchasing an annuity, men will receive a lower periodic pension than they do at present while the pension paid to women will increase. However, there appears to be some concern that the use of single-sex factors will do more than just average out benefits and that instead, the effect will be a general levelling down of benefits to those levels currently paid to women. It is not clear why this should be the case.¹³⁰ The use of unisex factors does not mean that total life expectancy increases, it just involves a greater distribution of the risk. The result, of course, will be that the average man subsidises the average woman but this communal pooling of risk is already the accepted basis for many insurance schemes. The main problem with unisex factors is the risk of market distortion between occupational schemes and private pensions provided by insurance companies. If unisex factors are used by final salary schemes to calculate capital sums the same lump sum payment would purchase women a lower level of annuity than men thus making the position more unequal than it is at present. The solution to this problem would be to

¹²⁸ *Moneywise*, June 1999, p 98.

¹²⁹ This would not prevent the continued use of single sex factors in order to predict the future liabilities of the scheme or pension provider and, in the case of final salary schemes, to ensure the solvency of the fund.

¹³⁰ Curtin D, 'Scalping the community legislator: occupational pensions and "Barber"' (1990) 27 CML Rev 475 at 494.

extend the requirement to use unisex factors to insurance companies. The evidence seems to be that this would have little significant impact on the long-term insurance market in the UK in terms of business volumes, profitability and solvency.¹³¹

In light of the above, what is the rationale underlying the continued use of single sex actuarial factors? It seems that the primary reason is the risk of market distortion between occupational schemes and the private insurance market. If occupational schemes are forced to use unisex factors while insurance companies used single sex factors women purchasing annuity contracts will be particularly disadvantaged. To avoid this all pension providers would have to be forced to use unisex factors at the same time. What is not clear is why the Government has not gone down this route. The fact that unisex factors are already used in several countries (eg the United States,¹³² France and Germany¹³³) implies that the problem of market distortion can be resolved. Perhaps the lack of movement in this area is simply a resistance on the part of the pensions and life insurance industries to the idea that the risk of life expectancy should be shared across the sexes with the result that the average man subsidises the average woman.

CONCLUSION

The existing legislative categories can be divided into two groups. The first group contains the positive action exceptions. Included in this group are the exception for more favourable treatment on the grounds of pregnancy and maternity (although strictly speaking this is a defence to a claim of indirect sex discrimination) the exceptions for bridging pensions and actuarial factors and, most significant of all, the positive action exception itself. The first three exceptions all take an identifiable sex difference (ie pregnancy, state pensionable age and life expectancy) and attempt to render the difference costless. In this way their aim is to enhance rather than detract from the ultimate aim of sex equality. The positive action exception itself is not limited to any particular sex difference but instead it is aimed at equal representation of the sexes in the workforce. The goal of equal representation can be achieved in many ways not all of which involve direct discrimination. From the perspective of legal certainty it is

¹³¹ See Curtin D (1990), above, p 495, note 73.

¹³² See Hervey T, 'Case note on *Neath v Hugh Steeper Ltd*' (1994) CML Rev 1387 at 1395.

desirable that the extent to which any exception covers direct discrimination should be clearly ascertainable. In this respect the domestic approach to positive action is preferable to the European approach. Although the domestic exceptions are not as wide in their application as the European exception they are extremely detailed and there can be little doubt whether they apply in any particular situation. By contrast, the European exception is no more than a general principle and, as a result, its application is very unclear as the case law demonstrates.

Two lessons can be learnt from the confusion surrounding the European positive action exception. First, any model justification defence for direct discrimination should be very detailed so that it is as clear as possible whether the defence applies or not in any given situation. Second, despite the comments of the European Commission in *Birds Eye Walls Ltd v Roberts*¹³⁴ that employers should be able to justify direct discrimination on the grounds of substantive sex equality, it is far from clear that this should be case. The extent to which employers should be allowed to use direct sex discrimination as a form of positive action is a very political question. It is arguable that scope for positive action direct discrimination should be decided by Parliament rather than individual employers and, therefore, positive action should be left outside the boundaries of the model justification defence. This whole issue is discussed in more detail in chapter 7.

The second group contains exceptions that allow direct discrimination despite the fact that it detracts from the ultimate goal of equality. In this group various rationales can be discerned. First, some of the exceptions are financially based in that they enable an employer to operate more profitably. For example, the exception that allows employers to restrict jobs working abroad to one sex. The second rationale is social utility. In these situations the goal of equality is sacrificed to another social goal. Perhaps the best example is the exception for personal services. The third rationale is the preservation of decency. This largely comes down to the idea that individual's should not have to undress or use toilet facilities in the presence of someone of the opposite sex. Finally, there is the entertainment exception that subordinates the goal of equality to artistic licence.

¹³³ Curtin (1987), above, p 217, note 9.

¹³⁴ [1994] IRLR 29, ECJ.

JUSTIFICATION OF INDIRECT SEX DISCRIMINATION

INTRODUCTION

Indirect sex discrimination is a mechanism for dealing with the detrimental effects of distribution sex differences. A *prima facie* case of indirect sex discrimination arises where a particular measure or working practice has a disproportionate and detrimental impact on one sex. However, the act of discrimination is not complete unless the employer fails to justify its use of the disputed measure or practice. Thus justification is an element of the tort of indirect sex discrimination although it is more often viewed as a defence.¹ This chapter takes a critical look at the constituent parts of the justification defence as a prelude to constructing a justification defence for cases of direct sex discrimination in chapter 7.

THE DEFINITION OF OBJECTIVE JUSTIFICATION

The European test for objective justification was originally set down by the ECJ in the case of *Bilka-Kaufhaus GmbH v Weber von Hartz*² in the context of Article 141 and later applied to the ETD.³ The test, which has not materially changed since *Bilka*, has now been incorporated into article 2(2) of EC Directive 37/97 on the burden of proof in cases of sex discrimination (BPD). Article 2(2) defines indirect sex discrimination in the following terms:

¹ Strictly speaking justification is an element of the tort of indirect discrimination rather than a defence. Thus, if the employer is able to justify the practice there is no discrimination in the first place rather than unlawful discrimination being rendered lawful by being justified. While it may be considered that this is purely a semantic distinction Bernard has argued that the way in which justification is viewed can have an impact on the way in which it is applied by the courts: Bernard N 'What are the purposes of EC discrimination law?' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, (1996) p 84.

² [1986] 2 CMLR 701, ECJ. See also the earlier case of *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] 2 CMLR 24, where the ECJ considered a difference in pay between part-time and full-time workers but did not actually define the treatment as indirect discrimination. For an overview of the other elements of indirect discrimination see: Prechal S, 'Combating indirect discrimination in the Community law context' (1993-4) LIEI 81.

³ See *Kording v Senator Fur Finanzen* [1997] IRLR 710, RCJ and *Gerster v Freistaat Bayern* [1997] IRLR 699, ECJ.

[I]ndirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

The definition of indirect discrimination applies to Article 141, the EPA, the ETD, the Pregnancy Directive and the Directive on Parental Leave (article 3). The BPD was adopted by the Council of Ministers in July 1997 and is due to be implemented by the member states no later than 1 January 2001. The wording of the SDA test for justification (which also applies to the EPA⁴) is slightly different in that the respondent must show that the measure is “justifiable irrespective of the sex of the person to whom it is applied”. Over the years there has been much criticism that the application of the SDA test by the national courts has fallen short of the stricter test set down by the ECJ.⁵ More recently, the national courts appear to have come much closer to the European test⁶ and with the implementation of the BPD any remaining differences between the two tests should disappear.

The justification test can be broken down into three elements.⁷ First, the employer must identify the objective or reason for the measure that has caused the disproportionate impact and that is unrelated to sex (the reason test). For example, an employer might give as reason for paying part-time staff a lower hourly rate of pay the additional administrative costs associated with part-time work. Second, the employer must prove that there is causal connection between the contested measure and the reason given for its use (the causation test). Thus, an employer might seek to justify the use of seniority payments on the basis that they reduce staff turnover. In which case, the employer must show that seniority payments do in fact reduce staff turnover and that there is a causal connection between the two. Third, there is the proportionality element.

⁴ *Jenkins v Kingsgate (Clothing Productions) (No 2)* [1981] ICR 715, EAT and *Rainey v. Greater Glasgow Health Board* [1987] ICR 129, HL. Although, for a different approach see the judgment of Lord Slynn in *Ratcliffe v North Yorkshire County Council* [1995] IRLR 439, HL, where he said: “In my opinion the EPA must be interpreted in its amended form without bringing in the distinction between so-called ‘direct’ and ‘indirect’ discrimination”.

⁵ See for example Hervey T, ‘Justification for indirect sex discrimination in employment: European Community and United Kingdom compared’ (1991) 40 ICLQ 807; Hervey T, *Justifications for sex discrimination in employment*, (1993) and Hepple B and others, *Improving equality law: the options*, p 6.

⁶ See for example, the decision of the House of Lords in *R v Secretary of State for Employment ex parte EOC* [1994] IRLR 176.

⁷ Townshend-Smith R, ‘Economic defences to equal pay claims’ in Hervey T and O’Keeffe D eds, *Sex equality in the European Union*, (1996) p 38.

This is essentially a two stage test: could the same benefit have been achieved using non-discriminatory means and does the adverse impact on the disadvantaged sex outweigh the benefit to the employer. Unless all three elements of the test are satisfied, the respondent's attempt to justify a disputed practice will fail.

THE REASON TEST

The first stage of the objective justification test involves the respondent putting forward a reason for using the practice or measure that is unconnected with sex. Several parameters can be ascertained from the case law. First, the reason must correspond to a real need on the part of the employer. Obviously, this rules out mere whims such as a minimum height requirement because the managing director has a preference for tall people. However, there is no need for the employer to demonstrate that the reason is essential to the viability of the business although the degree of benefit to the employer is a factor that the court can take into account as part of the proportionality test (see below).⁸ Furthermore, the reason must be one that is relevant to the function of the business of the employer as opposed to a wider policy objective for the benefit of the population at large. Thus the Police Authority could not justify a rule that candidates in receipt of an occupational pension would not be considered for appointment because the policy of reducing unemployment was entirely extraneous to the function of the Authority.⁹ This rule does not apply where the practice being challenged is enshrined in legislation. Where a government is seeking to justify a legislative provision, the only requirement is that the government should be able to come forward with a legitimate social aim. Thus in *R v Secretary of State for Employment ex parte EOC* the House of Lords accepted that increasing the availability of part-time work could properly be regarded as a beneficial social policy.¹⁰ Second, where a reason is expressed in the form of a policy decision by the employer, the policy must be constantly reviewed to ensure

⁸ See Anderman S, 'Constitutional law and labour law dimensions of Article 119: the case of justification for indirect discrimination' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, (1996) p 105.

⁹ *Greater Manchester Policy Authority v Lea* [1990] IRLR 372, EAT.

¹⁰ For a criticism of the Court's failure to consider whether the social policy put forward by the Government was indeed desirable see: Villiers C and White F, 'Agitating for part-time workers' rights' (1995) 58 MLR 650.

that the reason still applies. Thus a policy that job sharing will not be allowed in senior management position must be reviewed to ensure that the nature of the jobs has not changed thereby making job-sharing a feasible option.

Third, the fact that a job attracts a certain label or is in a certain category is not by itself a sufficient reason. Employers must go behind the label and identify the specific aspect of the job that justifies the measure being challenged. For example, the fact that an employee is employed on a casual basis is not by itself a reason for excluding the employee from certain benefits. The employer must identify the particular features of casual employment eg the way in which the employee is scheduled to work or the actual number of hours worked as reasons for the difference in treatment.¹¹ Fourth, the reason put forward by the employer must be one that is sufficiently significant to account for the whole of the difference in treatment. If it is not, only that part of the difference that is accounted for is justified.¹² Thus, if an employer is able to prove that 60% of a difference in pay is attributable to length of service but has no explanation for the remaining 40%, the defence can only succeed in respect of the 60% attributable to length of service. Finally, the existence of separate bargaining structures does not by itself justify a difference in treatment as collective bargaining is merely the process by which pay practices are agreed between employers and unions - it does not explain the reason for the difference.¹³

Although there is no limit on the kind of reason that can be put forward by an employer (subject to the parameters set out above) in most cases employers tend to rely on one of the following seven reasons. The first reason is that an employee must have the right skills to do the job. Thus selection criteria are often justified on the basis that they represent a necessary skill and without them the employee could not perform the job or could not perform it as effectively. Similarly, the factors in a job evaluation scheme

¹¹ *Buckle v Abbey National plc* IT, EOR Discrimination Case Law Digest, No 38, Winter 1998, p 2.

¹² *Enderby v. Frenchay Health Authority* [1994] 1 CMLR 8, ECJ. See Fredman S, 'Equal pay and justification' (1994) ILJ 37 at 40 and Hepple B, 'Equality and discrimination' in Davies P and Sciarra S eds, *European Community labour law: principles and perspectives* (1996), p 251. The position originally adopted by the domestic courts was that as long as the reason put forward explains a material part of the difference in treatment as opposed to a de minimis part, the whole of the difference is justified: *Calder v Rowntree Mackintosh Confectionary Ltd* [1993] ICR 811, CA and *Byrne v Financial Times Ltd* [1991] IRLR 417, EAT.

¹³ See *Enderby* (above) and *Barber v NCR (Manufacturing) Ltd* [1993] IRLR 95, EAT.

can be justified on the basis that they reflect the requirements of the job.¹⁴ The second reason relates to the timing and location of the work. Employees must be available to do the work when and where it occurs. Thus an employer can justify moving employees from term-time only working to year round working on the basis that the workload is reasonably constant throughout the year.¹⁵ Similarly, it will be reasonably easy for an employer to justify the need for a mobility clause in case the business relocates in the future.¹⁶ Third, there is seniority. Length of service is often considered to be an indicator of capability and performance and seniority is commonly used as a criterion in both promotion and redundancy situations.¹⁷

The fourth reason that is often put forward by employers is the need for continuity of service or management. This reason is often used in the context of part-time work or job sharing. The employer claims that the nature of the job is such that it cannot effectively be performed by more than one person.¹⁸ The fifth reason is indirect labour costs. Again, this argument is usually associated with part-time work and the costs involved often arise from the administrative expenses of employing more employees.¹⁹ The sixth reason is increased productivity. For example, in *Jenkins v Kingsgate Ltd*²⁰ the employer sought to justify a lower hourly rate for part-time employees on the basis that part-time employees could not make the optimum use of the machinery. The seventh and final reason is market forces. This reason is problematic because of the possibility that the market is itself discriminatory and thus the reason is related to sex. The whole concept of market forces as a reason for a difference in treatment is discussed in more detail below.

As the above list demonstrates, the reason put forward by the employer is invariably economic in nature. The measure having the disparate impact is necessary to

¹⁴ *Rummler v Dato-Druck* [1987] 3 CMLR 127, ECJ.

¹⁵ *Dick and Lamberty v Cambridge Area Health Authority* IT, EOR Discrimination Case Law Digest, No 11, Spring 1992, p 2.

¹⁶ *Meade-Hill v British Council* [1995] IRLR 478, CA.

¹⁷ See for example *Brook v London Borough of Haringey* [1992] IRLR 478, EAT.

¹⁸ See for example, *Eley v Huntley Diagnostics Ltd* IT, EOR Discrimination Case Law Digest, No 32, Summer 1997, p 2.

¹⁹ See for example, *Kidd v DRG Ltd* [1985] ICR 405, EAT. Although it seems that there may be a tendency amongst employers to over estimate the additional administrative costs of employing part-time staff: Szyszczak E, 'Differences in pay for part-time work' [1981] 44 MLR 672.

²⁰ [1981] IRLR 388, EAT. Whether the lower hourly rate was justified was never actually resolved because the case was settled after the EAT judgment.

the employer because it reduces labour costs, increases productivity or contributes to the efficient functioning of the enterprise. Without it, the employer would make less money. The bottom line is the profitability (or if it is a non-profit making, the efficiency) of the organisation. Thus justification of indirect discrimination is essentially an economic defence which allows employers to excuse practices that have a detrimental and disproportionate impact on one sex on the basis that it would cost too much to discontinue them. This raises the important question of how much is too much and at what point does the detriment to the applicant outweigh the cost to the employer. This difficult balancing exercise is discussed below in the section on proportionality.

The reason put forward by the employer must be unrelated to sex. When is a reason related to sex? The most obvious example is where the employer admits that the reason for the practice is that most of the persons affected are of one sex. For example, an employer admits that it pays part-time staff less because they are predominantly women. One of the areas where it is difficult to tell if the reason is sex related is market forces because of the possibility that a particular market is discriminatory. At this point it is helpful to review exactly that is meant by the phrase market forces. The market is not a homogeneous entity but is made up of many individual organisations each of which puts its own value on particular jobs. The wage levels offered by a particular employer are influenced by a number of internal and external considerations. Internal considerations include matters such as the position of the job within the hierarchy of the organisation, the profitability of the organisation, the availability of training and career path structures within the organisation. The main external factor is the wages paid by other organisations for comparable jobs and the effect that this has on an organisations ability to recruit and retain staff.²¹

When an employer relies on market forces in order to justify a difference in pay there are several possible scenarios. The first scenario is where an individual is recruited on a higher wage than other internal staff doing like work. The higher wage may be explained by factors specific to the individual such as special skills or experience. In this case market forces is something of a misnomer but, in any event, the reason for the difference is not related to sex. Alternatively, the higher wage could reflect the fact that

²¹ See generally Rubery J, *The economics of equal value*, EOC, (1992), chapter 2 and Industrial Relations Service, *Pay and gender in Britain*, EOC, (1991).

the wages of the previous employer were directly discriminatory. For example, an individual was paid more because he was a man. In this case the reason is sex related and the employer should not be able to rely on it. The third alternative is that the previous employer valued the job more highly than the new employer. Job evaluation is not an entirely objective exercise and, to some extent, it reflects the value of a job to a particular employer.²² As a result, it is possible for one employer to value a particular job more highly than another without either valuation being discriminatory. Assuming this is the case, the market force is not related to sex and the employer should be able to rely on it.

It was this kind of market forces scenario that arose in the case of *Rainey v. Greater Glasgow Health Board*.²³ In 1980, a prosthetics fitting service was established in the NHS in Scotland. Previously, the service was provided to NHS hospitals by private contractors. The remuneration level for prosthetists was set according to the Whitley Council scale and all direct recruits were paid on this basis. However, in order to get the service going offers of employment were made to 20 prosthetists (all male) currently working for private contractors. Since the NHS pay was below what the private sector prosthetists were currently earning, they were offered the option of remaining on their current pay and having any future changes negotiated by their trade union. The applicant, who was a direct recruit, compared herself to one of the men recruited from a private contractor. The HL accepted the respondent's argument that it was necessary to pay the private contractor prosthetists more in order to induce them to transfer. Despite the fact that all the prosthetists recruited from private contractors were male and all the direct recruits were female there was no evidence before the tribunal of gender segregation within the prosthetics profession as a whole.²⁴ It seems, therefore, that this may have been a case where the job of prosthetist was more highly valued by the private contractors than by the NHS. The alternative explanation is that the NHS undervalued the work of prosthetists although it is difficult to see why this would have

²² On the mechanics of job evaluation schemes and the factors they take into account in evaluating work see: *Equal pay for work of equal value: a guide to the non-discriminatory use of job evaluation*, British Psychological Society, (1991); Aaron J and Lougy C, *The comparable worth controversy*, (1986); ACAS, *Job evaluation: an introduction* and EOC, *Job evaluation schemes free of sex bias*.

²³ [1987] ICR 129, HL.

²⁴ Townshend-Smith R, 'Equal pay and the material factor/difference defence' (1987) 16 ILJ 114.

happened given that all of the individuals offered work from the private sector were male and there was no evidence of gender segregation.

The second market forces scenario is where there is a shortage of a particular profession and, as a result, wage levels rise. To the extent that a higher rate of pay is solely attributable to factors of demand and supply the market is not discriminatory. However, an element of caution is necessary where a profession is sex segregated ie predominantly performed by one sex. It has been suggested that one of the causes of low pay for women is that for reasons of custom or prejudice women are crowded into certain sections of the labour market. This leads to an over supply of women's labour in these areas which has a tendency to depress wages.²⁵ Similarly, it is possible that a shortage of labour in male dominated professions can lead to an increase in the market rate. As a result, if a difference in pay is explained by reference to a shortage of suitable candidates in the labour market, there may still be an element of discrimination if the profession is sex segregated. This problem arose in *Enderby v Frenchay Health Authority*.²⁶ The case involved a comparison between the predominantly female profession of speech therapy and the male profession of pharmacists. The Health Authority argued that a part of the difference in pay arose as a result of a shortage of suitably qualified pharmacists. The ECJ held that the state of the labour market and, in particular, a shortage of candidates and the need to attract them by higher salaries, can justify a difference in pay. However, the ECJ failed to consider why there was a shortage of pharmacists and whether this was in some way attributable to the structure of the profession eg the availability of part-time work.

The third market forces scenario arises in the context of work of equal value and the under valuation of women's work. For a number of social and historical reasons the value of women's work has been traditionally undervalued.²⁷ One way of overcoming this problem is for employers to implement job evaluation schemes that attempt to value jobs on the basis of their content and the skills required. Of course, not all employers go

²⁵ See Rubery J, above, p 9. For an analysis of the effect of labour force segregation on wages see: McColgan A, *Just wages for women*, (1997) p 246.

²⁶ [1993] IRLR 591, ECJ. For comment on this case see: Kentridge J, 'Direct and indirect discrimination after Enderby' [1994] PL 198; Fenwick H, 'Indirect discrimination in equal pay claims: backward steps in the European Court of Justice' (1995) 1 EPL 31 and Fredman S, 'Equal pay and justification' (1994) 23 ILJ 37.

down the job evaluation route. As a result, the market may continue to undervalue jobs that are predominantly done by women thereby creating a dichotomy between the employer's rate and the general market rate. In this situation, any attempt by an employer to use market forces as a basis for reducing women's pay will be discriminatory.

This was the situation that arose in *Ratcliffe v. North Yorkshire County Council*.²⁸ The applicants were employed as catering assistants by the respondent council. The applicants' jobs had been upgraded several years previously following a comprehensive job evaluation study undertaken by the National Joint Council (NJC) and, as a result, they were paid in excess of the market rate for catering assistants. To ensure that the council retained various catering contracts after the introduction of compulsory competitive tendering, the catering assistants were moved into a direct service organisation (DSO), dismissed and re-employed at rates some 10% lower than the NJC rates. Other higher graded staff and staff in predominantly male jobs transferred to DSOs were not subjected to pay cuts. The council argued that the reason for the difference in pay was the need to compete in the market place. The tribunal, in a decision that was upheld by the HL, found that while market forces may have been the material factor, it was not a material factor unrelated to sex because the market rates were themselves discriminatory. Despite recognising the difficulties faced by the council when dealing with external competition, the tribunal concluded that the market rates for catering assistants were discriminatory and could not be relied upon as a basis for reducing wage rates.

THE CAUSATION TEST

The second element of the objective justification test requires the respondent to demonstrate a causal connection between measures causing the disproportionate impact and the reason put forward for the measure. Thus, if an employer attempts to justify paying part-time staff a lower hourly rate on the basis that they are less productive, the employer must actually prove that part-time staff are less productive to the extent of the

²⁷ See Rubery J, above, p 7 and Pronszynski F and Richards W, 'Equal opportunities in the labour market: tackling indirect sex discrimination' (1995) 2 EPL 117.

²⁸ [1994] IRLR 342 CA, [1995] IRLR 439, HL. On the decision in the CA see: Collins H, 'CCT, equal pay and market forces (1994) 23 ILJ 341.

difference in pay. In some cases, the causal link will be self-evident and no problems of proof arise. Thus, in *Rainey v Greater Glasgow Health Board*²⁹ the HL was willing to accept the employer's assertion that private sector prosthetists would not transfer to the NHS unless their salary was maintained. However, even in the seemingly straightforward area of job requirements the causal link is not always self evident and problems can arise. For example, how does an employer prove that there is a causal link between age and an individual's ability to do a particular job, for example a social worker at a youth centre? The employer may argue that a younger person would be able to relate better to the young people using the centre.³⁰ This is not a matter that is capable of scientific proof but ultimately rests on the experience of the employer and other employers engaged in similar activities. Similarly, how does an employer prove that a particular bonus scheme encourages employees to work harder and, as a result, increases productivity assuming, of course, that it is possible to measure productivity in the first place? It may be impossible to separate out the effect of the bonus scheme from other factors that have an impact on employee productivity. In difficult areas such as these tribunals are likely to be satisfied that the causal link exists as long as some tenable evidence is put forward by the employer.

However, vague generalisations about the effect of a particular measure will not be sufficient. After a hesitant start this point was made by the ECJ in relation to seniority. Seniority can be used by employers in a number of different ways. First, it can be used as a basis for increasing pay, for example the payment of annual increments. Second, seniority may be used as a criterion for promotion. In both of these cases the underlying assumption is that there is a casual link between experience and performance. The third use of seniority arises in the context of redundancy. Last in first out is commonly used as a redundancy selection criterion. In the context of redundancy length of service could reflect either performance or loyalty to the employer. Initially, the ECJ appeared willing to accept that the link between seniority and experience did not require any special proof by the employer. Thus, in the *Danfoss*³¹ case the ECJ held that "since

²⁹ [1987] ICR 129, HL.

³⁰ A similar argument was used in *Jones v University of Manchester* [1993] IRLR 218, CA. The tribunal rejected the argument that a young careers adviser would be better able to relate to students.

³¹ [1989] IRLR 532, ECJ. For a note on the case see: Shaw J, 'The burden of proof and the legality of supplementary payments in equal pay cases' (1990) 15 ELR 260.

length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward it without having to establish the importance it has in the performance of specific tasks entrusted to the employee.”³²

In subsequent cases the Court has required a higher standard of proof and has rejected the use of generalisations about the effect of seniority on performance. For example, in *Nimz v Freie und Hansestadt Hamburg*³³ part-time employees working for between half and three-quarters of the normal working week had to work twice as many years before being moved up to the next salary grade. The City of Hamburg sought to justify the rule on the basis that full-time or three-quarters time employees acquire the skills necessary to do the job more quickly than other employees and gain greater experience. The ECJ rejected this argument on the basis that it amounted to a simple generalisation about a certain category of employee.

[A]lthough seniority goes hand in hand with experience which, in principle, should allow the employee to carry out his tasks all the better, the objectivity of such a criterion depends on all the circumstances in each case and notably on the relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of working hours have been worked.³⁴

In line with the ECJ’s comments in *Nimz* employers will only be able to rely on seniority if they can show that length of service enhances performance in relation to a particular job. Thus, where a job involves a low level of skill and is highly repetitive in nature it is unlikely that seniority will lead to increased performance. On the other hand, the more skilled and diverse the job, the more likely it is that seniority is linked to performance. However, the employer still has to show that performance continues to improve over the number of years specified. Thus, a job may be sufficiently complex that performance increases over the first three years but then levels off. In such a situation an employer

³² In *Danfoss* the employer attempted to explain differences in salary on the basis of length of service. On reference back to the national court the link was rejected on the basis that over the previous five years the average differences in salary between women and men had increased while the average differences in seniority had decreased: see Precht K, ‘Danfoss in the Danish courts’ (1992) 21 ILJ 323.

³³ [1991] IRLR 222, ECJ. For a note on the case see: More G, ‘Seniority pay for part-time workers’ (1991) 16 ELR 320.

³⁴ The ECJ made similar comments in relation to seniority in *Kording v Senator Fur Finansex* [1997] IRLR 710, ECJ and *Gerster v Freistaat Bayern* [1997] IRLR 699, ECJ.

may not be able to justify a length of service criterion of five years for promotion to the next grade.

The rule that generalisations are an insufficient basis on which to establish a causal link also applies where the provision being challenged is enshrined in legislation. Thus in *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH*³⁵ a German law excluded employees working less than 10 hours a week or 45 hours a month from the right to sick pay from their employers. The German Government sought to justify the rule on the basis that part-time workers are not integrated in and connected with the undertaking in a way comparable to that of other workers. Although leaving the matter to the national court to decide, the ECJ indicated that the reason given by the German Government was insufficient as it only amounted to a generalised statement about certain categories of workers.

The ECJ made the same point in the recent case of *R v Secretary of State for Employment ex parte Seymour-Smith and Pérez*.³⁶ The Government sought to justify increasing the service requirement for a right to claim unfair dismissal from one to two years on the basis that it would stimulate recruitment. The ECJ accepted that encouraging recruitment constitutes a legitimate social aim and that Member States have a broad margin of discretion in choosing measures capable of achieving those aims. However, that broad margin of discretion does not mean that no evidence of causation is required.

Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim.³⁷

³⁵ [1989] IRLR 493, ECJ. On this case generally see: 'Discriminatory statutory rights can be challenged under EEC law' EOR No 28, November/December 1989, p 39; Szyszczak E, 'European Court rulings on discrimination and part-time work and the burden of proof in equal pay claims' (1990) 19 ILJ 114 and Craig V, 'Indirect sex discrimination and statutory conditions' (1992) 60 Scottish Law Gazette, 14.

³⁶ [1999] IRLR 253, ECJ. For a discussion of this aspect of the case see: Barnard C and Hepple B, 'Indirect discrimination: interpreting *Seymour-Smith*' (1999) 58 CLJ 399 at 409.

³⁷ Although, for a case where the ECJ did appear to be willing to accept a generalisation see *Kirshammer-Hack v Sidal* [1994] IRLR 185, ECJ. German legislation on unfair dismissal does not apply to businesses employing five or less employees. The claim of indirect discrimination failed at the first hurdle because there was no evidence of disproportionate impact. However, the ECJ indicated that even if there had been evidence of disproportionate impact the measure would have been justified on the basis that it was intended to alleviate the constraints on small businesses and thus lead to job creation. The ECJ does not appear to have considered whether the right to claim unfair dismissal was in fact a bar to job creation or

Thus, mere generalisations are not enough to prove that a legislative measure has the desired effect.

On the other hand, all a Government has to do is to provide reasonable evidence of a link. The inability of the United Kingdom Government to do even this was demonstrated in the case of *R v Secretary of State for Employment ex parte EOC*.³⁸ The Government was seeking to justify the hours thresholds that applied to the right to claim unfair dismissal and redundancy. Employees that worked less than eight hours a week were excluded altogether and employees working between eight and sixteen hours a week had to work for five instead of two years before becoming entitled to the rights. It was argued by the Government that the thresholds had the effect of increasing the availability of part-time work. In particular, if part-time employees had the same rights as full-time employees employers would be inclined to employ less part-time employees and more full-time employees. Lord Keith, giving the leading speech in the HL, accepted that bringing about an increase in the availability of part-time work could be regarded as a beneficial and necessary social aim. However, he found that the Government had failed to establish the requisite causal link. The evidence put forward by the Secretary of State “consisted principally of an affidavit by an official in the Department of Employment which set out the views of the Department but did not contain anything capable of being regarded as factual evidence demonstrating the correctness of these views.”

The Government lost the EOC case because it was unable to produce any factual evidence that there was a causal link between the thresholds and the availability of part-time work. However, in light of the indication of the ECJ in *Seymour-Smith and Perez* that only a reasonable level of evidence is required, it seems that the standard of proof is not very high and had the Government approached the matter differently they may have been able to justify the thresholds.³⁹

whether the claim of the German Government was a mere generalisation. For a note on this case see: Hervey T, ‘Small business exclusion in German dismissal law’ (1994) 23 ILJ 267.

³⁸ [1994] IRLR 176, HL.

³⁹ For example, had the Government sought to justify the thresholds on the basis of the disproportionate costs associated with employing part-time employees. For the argument that there is no evidence that thresholds increase part-time employment see: Disney R and Szyszczak E, ‘Part-time work: reply to Catherine Hakim’ (1989) 18 ILJ 223. For a criticism of the *EOC* case and in particular the problems of proving the effect of measures on a macro-economic level see: Seba I, ‘The doctrine of direct effect: a malignant disease of community law’ [1995] LIEI 35 at 55.

THE PROPORTIONALITY TEST

The proportionality test consists of two separate elements.⁴⁰ Under the first element the court must consider whether it would have been possible for the employer to achieve its objective in a less discriminatory way (the means test). In other words, the tribunal has to decide whether the employer could have reasonably avoided the detriment to the employee. Assume an employer decides to relocate part of its business from London to Glasgow. All those employees who are unable to move are dismissed. If the measure can be shown to have a disproportionate impact on one sex, under the means test the tribunal is obliged to consider whether the dismissals could have been avoided. For example by finding suitable alternative employment for the dismissed employees in the part of the business that remains in London. In theory, tribunals can go even further than this and consider whether the move itself could have been avoided. However, the courts have shown some reluctance to interfere with the management of a business, particularly where the arrangement complained of is complicated and has been agreed with the relevant trade unions. Thus the domestic courts have refused to interfere with redundancy schemes that fail to take account of an individual's previous full-time service⁴¹ or with selection for redundancy on the basis of last in first out.⁴² Furthermore, although the burden of justifying the detrimental treatment lies with the employer, in practice the courts are unlikely to consider alternative options unless the applicant brings them to the attention of the court.

Even if an applicant does put forward an alternative option, there is no guidance in the legislation or the case law on the factors the tribunal should take into account in determining whether it would have been reasonable for the employer to adopt that course of action. In particular, it is not clear to what extent cost is a relevant consideration, both the overall cost of the option and the ability of the employer to accommodate the cost. The size and resources of an employer is a factor that is relevant in a number of employment contexts. For example, the size and administrative resources of the

⁴⁰ For the general application of the principle of proportionality in equal treatment cases see: Arnall A, *The general principles of EC law and the individual*, (1990) chp 14.

⁴¹ *Barry v Midland Bank* [1998] IRLR 139, CA,

⁴² *Brook v London Borough of Haringey* [1992] IRLR 478, EAT.

employer is relevant in determining whether an employer has acted fairly in dismissing an employee.⁴³ Similarly, under s 6 (4) of the DDA, the extent of the employer's financial and other resources is a factor that a tribunal must have regard to in determining whether it is reasonable for an employer to make an adjustment in order to accommodate a disabled person.⁴⁴ In both of these situations the ability of the employer to cope with a particular level of cost is taken into consideration with more being expected of larger employers. There is no logical reason why indirect discrimination cases should be treated any differently particularly given that some of the adjustments employers may be obliged to make under the DDA are likely to be similar, if not identical, to the changes at issue in cases of indirect discrimination. For example, a disabled person may only be able to work part-time. It would be anomalous if tribunals could take the resources of the employer into account in determining whether part-time work is a reasonable adjustment for a disabled person but not in the context of a single parent with child care commitments.

One case where the cost of an alternative option was considered is *London Underground v Edwards*.⁴⁵ The employer introduced a new rostering system with anticipated savings of £10m. The applicant was unable to work under the new system because it did not give her the flexibility she needed. London Underground had at one point suggested a special roster for single parents but the scheme was dropped after it failed to gain the support of the unions. In a decision that was upheld by the EAT, the tribunal held that the needs of single parents like the applicant could have been catered for without a "significant detriment" to the £10m in savings sought to be made by the employer by the new rostering scheme. Although the tribunal did not attempt to put a figure on the cost of introducing a special scheme for the applicant, it clearly took the view that whatever the cost was, it was reasonable for London Underground to accommodate it.

Another factor that might be relevant is the impact of the option on the other employees. One of the points raised by London Underground on appeal was that a

⁴³ Section 98, Employment Rights Act 1996.

⁴⁴ The obligation on employers to make reasonable adjustments under the DDA is discussed in more detail in Chapter 6.

⁴⁵ [1995] IRLR 355, EAT. The case subsequently went to the CA but justification was not an issue as the appeal related solely to the issue of disparate impact: [1998] IRLR 364.

separate scheme for single parents amounted to positive discrimination in their favour. However, given the evidence that the applicant was the only one of over two thousand train operators who could not comply with the new system it is unlikely that a special scheme for single parents would have had much, if any, impact on the rosters of the other employees. However, in a situation involving a smaller workforce, the impact of an alternative arrangement on the other employees is a factor that the court can take into account.⁴⁶

The second element of the proportionality test is used more by the domestic courts than the ECJ.⁴⁷ According to the Court of Appeal in *Hampson v Department of Education and Science*⁴⁸ the justification test requires an objective balance between the detrimental effect on the applicant and the benefit to the employer. The ECJ has not gone as far and only requires the first element of the proportionality test to be satisfied ie that there are no alternative non-discriminatory means of achieving the employer's objective. It is not clear why the ECJ has adopted a less stringent test than the domestic courts. One possible explanation is a reluctance on the part of the ECJ to interfere too much with managerial discretion or to impose heavy costs on businesses.⁴⁹ Another possibility is that it would be difficult for the ECJ to apply this aspect of proportionality in the context of legislative provisions without encroaching on the broad margin of discretion left to member states in determining social policy (see below).

At first glance the balancing exercise appears quite straightforward. The tribunal has to balance the detriment to the employee and the benefit to the employer. However, if the benefit to the employer is increased productivity and the detriment to the employee is a lost job opportunity how *could* the tribunal go about comparing these two things? (This is a discussion about what tribunals could do rather than what they actually do as it seems that in practice tribunals apply the proportionality principle in an impressionistic way rather than on the basis of any accurate cost/benefit analysis.) In any situation it is

⁴⁶ See for example, *Bell v East Kilbride Development Corporation*, EOR Discrimination Case Law Digest No 12, Summer 1992, p 2. The tribunal took into account the fact that allowing the applicant to work part-time would have increased the pressure of work on all the other members of the department.

⁴⁷ Although it is used by the ECJ in other contexts for example in actions against the Community: see De Búrca G, 'The principle of proportionality and its application in EC Law' (1993) 13 YBEL 105.

⁴⁸ [1989] IRLR 69 at 75, CA. *Hampson* is a race case but the requirement for an objective balance has also been applied in cases of indirect sex discrimination: see for example *Jones v University of Manchester* [1993] IRLR 218, CA.

⁴⁹ Anderman S, above, p 109.

impossible to balance two objects in the absence of a common characteristic or a common criterion of measurement. When comparing the benefit to an employer and the detriment to an employee the only objective way of comparing the two is to work out their monetary values. In other words, the tribunal has to know how much a detriment or benefit is worth in each case. However, assigning a monetary value to a benefit or a detriment can itself be fraught with difficulty. In some cases the benefit to the employer is comparatively easy to estimate. For example, if an employer operates a production line and work has to stop in order to allow a shift change for part-time employees the employer may be able to calculate the value of the lost production. However, in the majority of cases the benefit to the employer is much more difficult, if not impossible, to quantify in monetary terms. An employer may seek to justify a refusal to allow an employee to job share on the basis that the job requires continuity of management. The effects of discontinuous management may include a reduction in the level of customer service but the cost to the employer in terms of lost business may be hard to assess, particularly if the employer is predicting what the effect of allowing the job share would be rather than reporting on actual experience. Thus there may be significant evidential problems for the tribunal in determining the benefit to an employer of a particular practice.

The other side of the equation, the detriment to the employee, is much easier to quantify. In most cases the detriment will fall into one of four categories; lack of promotion or appointment, dismissal, a lower rate of pay or a denial of some other employment benefit eg access to an occupational pension or a severance scheme. Tribunals commonly have to assess the monetary value of detriments such as these in calculating the compensation element of an unfair dismissal or discrimination claim. There is also the question of whether injury to feeling should be taken into account. For example, in a dismissal case should the tribunal add into the equation the applicant's distress in losing his or her job? There is no logical reason why injury to feelings should not be considered in which case the tribunal must, in addition to assessing the financial loss, assign a monetary value to the injured feelings.

Once the tribunal has assigned a monetary value to the benefit and detriment there are three possible outcomes; the benefit to the employer is greater than the detriment to the employees, the benefit to the employer is less than the detriment to the

employee or the two figures are equal. In which of these three possible situations is the employer's practice justified? The legislation is silent on this point and the case law is not particularly revealing. However, there are cases where tribunals have accepted that a practice is justified despite the fact that the benefit to the employer is less than the detriment to the employee. For example, in *Buckle v Abbey National plc*⁵⁰ the tribunal held that the exclusion of casual workers from the benefit of private health insurance was justified. The benefit to an individual of private health insurance is essentially the cost of the premiums on the open market. On the assumption that employers like the Abbey National can buy health insurance for their employees more cheaply than an individual can do so on their own, the benefit to the employer of excluding casual staff is less than the loss to the employee.

Another example where employers seem able to justify a practice even though the benefit to them is less than the loss to the employee is the exclusion of part-time employees from occupational pension schemes. In the case of *Bilka-Kaufhaus* the ECJ held that the exclusion of part-time employees from an occupational pension scheme could amount to indirect discrimination unless objectively justified by the employer. The view of several commentators is that it will be relatively easy for employers to justify hours thresholds on the basis of the relatively high administration costs of including employees with low working hours.⁵¹ Unless the employee is working very few hours it is unlikely that the administration costs will exceed the benefit to the employee particularly if the scheme is non-contributory. Thus, the ability of employers to exclude part-time employees from pension schemes appears to be another situation where the benefit to the employer does not have to outweigh the loss to the employee.⁵² On the other hand, there are no reported cases where a tribunal has found that a practice is not justified in circumstances where it was clear that the benefit to the employer was more than the detriment to the employee. However, there is no reported case where the

⁵⁰ EOR Discrimination Case Law Digest, No 38, Winter 1998, p 2.

⁵¹ See for example, Whiteford E, 'From non-discrimination to equality: pensions and EC law' in Dashwood A and O'Leary S eds, *The principle of equal treatment in ECJ law*, (1997) at p 264 and Fredman S, 'The poverty of equality: pensions and the ECJ' (1996) 25 ILJ 91 at p 106.

⁵² See also the *Vroege* case [1994] IRLR 651, in which the right of the employer to restrict the scheme to employees working more than 25% of the time was not questioned by the ECJ and the social security cases of *Megner and Scheffel* [1996] IRLR 236, ECJ and *Nolte* [1996] IRLR 225, ECJ in which the ECJ upheld the decision of the German Government to exclude employees working fewer than 15 hours per week from statutory old-age and sickness benefit schemes.

tribunal has actually attempted to work out the actual sums involved and, therefore, it is impossible to tell whether the benefit outweighed the detriment or visa versa.

It is not certain what other considerations the tribunal can take into account. In particular, it is not clear if the ability of the employer to absorb the cost is relevant. If tribunals are allowed to take the size and resources of the employer into account in determining whether there is some other viable option under the means test, it seems sensible that this should also be a relevant factor under the second element of the proportionality test. However, if the effect on the employer's business is relevant, the effect of the detriment on the employee's life should also be taken into consideration. In other words, it is not the absolute benefits and detriments that should be in the balance, but the relative costs for the employer and employee. The detriment to the employee of a dismissal may be £5k in terms of lost income but the relative impact may be even greater. For example, the employee may lose his or her house due to an inability to pay the mortgage. On the other hand, a benefit to the employer of the same amount may have a relatively small impact on the business as a whole. Thus, if the relative impact is taken into account rather than a strict cost/benefit analysis, the balance is more likely to come down in favour of the employee. The down side to a relative analysis is that the legality of a particular practice depends on the personal circumstances of the individual employee. Thus, it may be lawful for an employer to dismiss a wealthy employee but not a poor employee.

Another point is that if tribunals do not take the resources of the employer into account, the cost of introducing a new working practice could push the employer into insolvency which itself could have a detrimental impact on the employee. There is little point in an employee managing to persuade a tribunal that part-time work should be allowed if the result is that the employer closes down and the employee loses his or her job. Again, there is no reported case law on this point and so there is no readily accessible way of telling whether tribunals take cost into account and if so, whether they apply a relative analysis of the benefits and detriments or whether they just look at the absolute amounts.

Another possible factor is the number of employees affected. At first glance it seems sensible that the more employees detrimentally affected the more difficult it should be for the employer to justify the practice. However, a certain amount of caution

is needed in order to avoid any double counting. Where there are a number of employees affected the tribunal has three possible approaches; compare the total detriment with the total benefit, use an average benefit and an average detriment or try and work out precise figures for each applicant. Whichever method the tribunal uses, the number of employees has already been taken into account in determining the level of detriment and benefit. In order to avoid any double counting the question needs to be posed in a much more restricted way. If an employer implements a measure does it make any difference if it affects ten employees to the extent of £500 each or one employee to the extent of £5,000? It is not immediately apparent that it is worse to impose a minor detriment on several employees than a major detriment on one employee. Once the question is reformulated in this way it is far from clear that the number of employees affected should be taken into account as an additional factor.

The balancing exercise poses a particular problem in cases involving statutory provisions because there is a risk of the courts becoming embroiled in political decisions. The problem can be demonstrated by reference to the *EOC* case. The Government lost the case because it was unable to establish the requisite causal link. Assume that the Government had been able to overcome this hurdle. The HL would have had to consider three competing factors; the benefit to employers of a restricted right to unfair dismissal and redundancy, the detriment to part-time employees of the hours thresholds and the Government's objective of increasing the availability of part-time work. In his judgment Lord Keith indicated that the impact on employers would be limited by the relatively small number of part-time employees unfairly dismissed or made redundant in any year. Although no mention was made of the impact on employees, as far as redundancy is concerned, the cost to the employer of a redundancy payment is the same as the benefit to the employee. The position with unfair dismissal is more complicated because the right enhances job security and, therefore, it is worth more to an employee than the compensation available if he or she is unfairly dismissed. Furthermore, the benefit to employers of being able to dismiss with impunity is difficult to translate into monetary terms. Even more difficult for the Court to assess is the Government's objective of increasing part-time employment. What are the benefits to society of an increase in part-time work? Do these benefits warrant a restriction on the right to claim unfair dismissal or a redundancy payment? This is an inherently political decision which it is impossible

for a judge to decide without making a political judgment.⁵³ Given that the ECJ does not require national courts to engage in a balancing exercise and the political nature of the decisions involved, it is perhaps unlikely that the national courts will apply the second element of the proportionality test to cases involving statutory provisions. It is possible that some guidance will be given on this point when *Seymour-Smith* returns to the HL but, in light of the views of the ECJ on the issues of causation and disproportionate impact, it seems unlikely that the HL will get as far as applying the proportionality part of the justification test.

CONCLUSION

Indirect discrimination involves a balancing exercise between two competing aims; eliminating the detrimental effect on employees of distribution sex differences versus the necessity for businesses to operate efficiently and make a profit. The ability of the legislation to achieve its aim of sex equality depends on the circumstances in which the primary objective (eliminating detriment) can be overridden by the secondary consideration (business need).⁵⁴ If too much weight is given to the business needs the legislation becomes ineffectual.⁵⁵ On the other hand, if too much weight is given to eliminating the detrimental impact, employers will become less efficient which may result in lower wages, higher product costs and fewer jobs.⁵⁶ This delicate balancing act is dealt with by the justification defence and, in particular, the proportionality test.

Once it has been established that a particular practice had a disproportionate and detrimental impact on one sex the practice is unlawful unless it can be justified by the employer. The three stages of the justification defence are a considerable hurdle for employers to overcome. First, the employer has to identify the business reason or objective for the disputed practice. Although, in theory, employers should know why

⁵³ See Seba I, above, p 55 and Hartley TC, *The foundations of European Community law*, (1998) at 149.

⁵⁴ Leader S, 'Proportionality and the justification of discrimination' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, (1996).

⁵⁵ For the ways in which economic arguments and market forces limit the operation of anti-discrimination laws see Fredman S, 'European Community discrimination law: a critique' (1992) 21 ILJ 119 at 130 and Fenwick H and Hervey T, 'Sex equality in the single market: new directions for the European Court of Justice' (1995) 32 CMLR 443.

⁵⁶ Posner R, 'An economic analysis of sex discrimination laws' (1989) 56 University of Chicago Law Review 1311.

they act in a certain way the reason for a particular practice may be historical and, therefore, difficult to trace or it may be obscured by the process of collective bargaining. Thus even at this first stage employers may encounter considerable evidential difficulties in establishing a justification defence. Secondly, the employer has to establish the requisite causal link ie that the disputed practice does in fact result in the intended objective. In many ways this is the most difficult element of the defence for employers to prove because it may be impossible to separate out the effect of the disputed practice on the stated objective from the impact of various other factors on the same objective.

Finally, and assuming that the employer is successful on the first two points, the tribunal applies the proportionality test. In many ways, the means test is the weakest element of the justification defence because tribunals are so reluctant to interfere with management decisions. Furthermore, in the absence of any specific guidance it is not clear to what extent employers are obliged to implement alternative options that have additional costs attached to them. However, if the tribunal is satisfied that there was a non-discriminatory means of achieving the same objective the defence fails. The second element involves a balancing exercise between the detriment to the employee against the benefit to the employer. This balancing exercise is the key component of the defence because it is the point at which the tribunal decides whether the primary objective of sex equality should be overridden by the needs of the business. The whole concept of a balancing exercise implies that, subject to the application of other relevant factors such as the ability of the employer to absorb the cost, the tribunal should come down in favour of the party with the greater value. (This is assuming that it is the absolute amounts that are being balanced and not the relative detriments and benefits). Thus, if the detriment to the applicant is £100 and the benefit to the employer is £90 the tribunal should, in theory, find that the test of proportionality has not been satisfied. In practice it seems that tribunals do not always approach the matter in this way and in some cases they apply a weaker test based on whether the detriment is a significant proportion of the benefit. This means that an employer is able to justify a practice despite the fact that the detriment to the employee is greater than the benefit to the employer. This constitutes a very weak application of the proportionality test and allows the objective of equality to be overridden by the needs of the employer relatively easily. On the other hand, it is possible that there are cases where the tribunal applies a much stronger test and the

defence fails despite the fact that the benefit to the employer outweighs the detriment to the applicant.

DISABILITY DISCRIMINATION

INTRODUCTION

The employment provisions of the DDA came into effect on 2 December 1996.¹ The Act introduced into domestic law for the first time a prohibition against disability discrimination. The DDA contains two forms of prohibited treatment. The first form involves less favourable treatment for a reason related to disability. The second form arises when an employer fails to make a reasonable adjustment in circumstances where a disabled employee is placed at a substantial disadvantage in comparison with a non-disabled employee. In both cases the discrimination can be justified for a reason that is both material and substantial. There is a tendency for the courts and some writers to view the first kind of disability discrimination as a form of 'direct' discrimination that has the same effect as direct sex discrimination.² This, in turn, has led to the impression that it is possible to justify direct disability discrimination and, as a result, the prohibition against disability discrimination is weaker than the prohibition against sex discrimination. The purpose of this chapter is two fold. First, to consider whether there is such a thing as direct disability discrimination, and if so, why it is possible to justify direct disability discrimination but not direct sex discrimination. Second, the justification defence is examined to see if any of its elements are an improvement on the justification defence that is used in cases of indirect sex discrimination.

DEFINITION OF DISABILITY

Section 1 states that a person has a disability if he has "a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal

¹ Disability Discrimination Act 1995 (Commencement No 3 and Saving and Transitional Provisions) Order 1996, SI 1996/1474. On disability discrimination generally see: Doyle B, 'Employment rights, equal opportunities and disabled persons; the ingredients of reform' (1993) 22 ILJ 89 and Doyle B, *Disability discrimination: law and practice*, (1996).

² See for example G Thomas, *The new law on disability*, (1997) p 14 and *O'Neil v. Symm & Co Ltd*,

day-to-day activities". The various elements of the definition are explained in more detail in schedule 1 of the DDA. In addition, the Government has issued guidance under s 3 of the DDA which must be taken into account by courts and tribunals in determining whether the statutory test of disability applies. Finally, a number of conditions are specifically excluded from the definition of disability under Regulations made pursuant to schedule 1 of the DDA.³

Normal day-to-day activities are defined in schedule 1, paragraph 4. The impairment must have an adverse affect on the applicant's ability to carry out one of the following eight activities-

- mobility
- manual dexterity
- physical co-ordination
- continence
- ability to lift, carry or otherwise move everyday objects
- speech, hearing or eyesight
- memory or ability to concentrate, learn or understand
- perception of the risk of physical danger

In addition, paragraph 3 of schedule 1 states that a severe disfigurement is to be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities. It is not necessary that an individual is wholly unable to perform one of the eight activities. All that is required is that the applicant's ability to undertake one or more of the activities is substantially impaired. For example, a lack of manual dexterity may mean that a person is still able to cook but only with the greatest difficulty.⁴

The guidance makes it clear that the phrase day-to-day activities is not intended to cover activities that are specific to particular groups of individuals or to particular forms of work (para C2). For example, the fact that an individual is unable to undertake a particular job or to play a musical instrument would not count as a normal day-to-day activity. The impairment must have a substantial and long-term effect. Substantial is not defined in the DDA but paragraph A1 of the guidance states that substantial means more than minor or trivial and represents a limitation going beyond "the normal differences in

[1998] IRLR 233, at para 41.

³ The Disability Discrimination (Meaning of Disability) Regulations 1996, SI 1996 No 1455. The conditions covered by the Regulations include addiction to alcohol, nicotine and drugs, a tendency to steal and to sexual or physical abuse of others, exhibitionism, voyeurism, tattoos, body piercing and hay fever.

⁴ *Goodwin v. The Patent Office* [1999] IRLR 4, EAT.

ability which may exist among people".⁵ In measuring the severity of the impact, no account is to be taken of any medical treatment or measures being taken to treat or correct the effect. For example, the fact that an individual's hearing loss can be treated with a hearing aid does not prevent that individual from continuing to suffer from a disability (schd 1, para 6(1)).⁶ The effect of an impairment is long-term if it has lasted for 12 months, is expected to last for twelve months or it is likely to last for the rest of the life of the person affected (schd 1, para 2(1)). In order to cope with fluctuating conditions, the Act states that where an impairment ceases to have a substantial adverse effect, it shall be treated as continuing to have that effect if the effect is likely to recur (schd 1, para 2(2)).⁷

It is not necessary that the disability must have occurred at a time when the DDA was in force (s 2(5)) but the individual must be able to show that at some time in the past he or she had a disability that actually lasted for at least 12 months (schd 2, para 5). Finally, the employment provisions of the DDA also apply to a person who has had a disability in the past (s 2(1)).

DISABILITY DIFFERENCES

In chapter one the difference between direct and indirect sex discrimination was analysed in terms of the underlying sex differences. It was argued that there are two forms of direct sex discrimination. The first form arises as a result of detrimental treatment on the ground of a categorical sex difference or the unique sex differences of pregnancy and maternity. To recap, categorical sex differences are characteristics that are shared by all of the members of one sex but no members of the other sex. They are small in number with the main three being chromosomal composition, the sexual organs and the gonads. Unique sex differences are characteristics that apply to some of, but not all, the members of just one sex. They are relatively few in number with the main female ones being pregnancy and maternity. The second form of direct sex discrimination involves the

⁵ Examples of substantial adverse effects on the eight activities set out in schedule 1 to the Act are given in paragraphs C14 to C21 of the guidance.

⁶ The one exception to this rule is impairment of a person's sight to the extent that the impairment can be corrected by spectacles or contact lenses (schd 1, para 6(3)).

⁷ The guidance states that an effect is likely to recur if it is more likely than not that the effect will recur (para B3).

detrimental application of a sex stereotype. By contrast, indirect sex discrimination involves the use of distribution sex differences (ie characteristics that apply to both groups but to varying extents) and the remaining unique sex differences other than pregnancy and maternity. The range of distribution differences between the sexes is enormous and includes both physical and social characteristics such as body weight and income levels.

In contrast to the position with sex, there are no categorical disability differences. This is because disability is defined in relation to a range of eight normal day-to-day activities and it is only necessary for one of these activities to be severely impaired for the definition to apply. As a result, there is no one characteristic that is shared by every person with a disability. On the other hand, there are a large number of unique disability differences that derive from the list of normal day-to-day activities set out in schedule 1 of the DDA. Each of the eight activities on the list gives rise to a range of characteristics that are unique to the disabled.⁸ For example, a severe visual impairment is a characteristic that is unique to some, but not all, people with a disability. There are also a large number of distribution disability characteristics including, for example, the ability to drive or use public transport. In some cases, a characteristic may be both a sex and a disability distribution difference although there is likely to be a variation in the size and distribution of the difference. For example, both women and people with disabilities are disproportionately likely to be in lower level jobs.⁹ The fact that there are no categorical disability differences is a fundamental distinction between sex and disability discrimination and it is helpful to keep this point in mind when considering the disability differences underlying the two forms of disability discrimination.

LESS FAVOURABLE TREATMENT

Section 5(1) states that an employer discriminates against a disabled person if "for a reason which relates to the disabled person's disability, he treats him less favourably than

⁸ Severe disfigurement is deemed to be a disability and therefore forms the basis for another unique disability difference (schd 1, para 3).

⁹ Department of Employment, *Employment and Training for people with disabilities*, (1990) p 13; B Doyle, *Disability discrimination and equal opportunities: a comparative study of the employment rights of disabled persons*, (1995), p 17.

he treats or would treat others to whom that reason does not or would not apply." In other words, the section covers both less favourable treatment on the ground of disability per se and less favourable treatment for a reason related to disability. An example of the former is *Lang v Redland Roofing Systems Ltd*.¹⁰ The applicant had a clinically recognised mental illness. During her first year at work she was absent from mid May to mid July. The following May she was ill again and presented her employer with a medical certificate indicating that she was suffering from a psychosis and would be absent from work for a month. She was subsequently dismissed because of her health problems. The tribunal found that she would not have been dismissed if she had had a physical illness. In other words, the applicant was dismissed because of her disability in itself (that is, her psychosis) and not for a reason related to her disability (her absence from work).

Section 5(1) also covers detrimental treatment for a reason that relates to a disabled person's disability.¹¹ For example, in *Clark v TDG Ltd*¹² the applicant was disabled as a result of an injury at work. He was dismissed after being absent from work for four months and at a time when his doctors were unable to give an indication of when he would be able to return to work in the next twelve months. The tribunal and the EAT accepted the respondent's argument that there was no discrimination under s 5(1) because a non-disabled person absent for a similar period of time would also have been dismissed. On appeal the CA rejected the respondent's argument and held that the section applies whenever there is a causal link between the applicant's disability and the reason for the dismissal irrespective of whether a non-disabled person would have been dismissed for the same reason. Thus, in this case it was irrelevant that a non-disabled person absent from work for a similar length of time would also have been dismissed.¹³

Another example of a disability related reason is *Champeau v Bournemouth*

¹⁰ EOR Discrimination case law digest, No 35, p 9.

¹¹ The fact that the less favourable treatment must be for a reason related to the *applicant's* disability means that the Act does not protect an individual treated less favourably because of a third party's disability, eg a parent who is refused employment because the employer assumes that he or she will have to take time off work to care for a disabled child: see para 2.5 of the code of practice.

¹² [1999] IRLR 318, CA.

¹³ For other cases of sickness absence see: *Cox v The Post Office* IDS Brief 609, p14 (the applicant was dismissed after he was absent from work for sickness as result of his asthma) and *Samuels v Wesleyan Assurance Society* IDS Brief 601, p 11 (the applicant was dismissed for unacceptable 'levels of absence resulting from his multiple sclerosis).

Orchestras.¹⁴ The applicant was partially sighted to the extent that she was unable to drive. She was dismissed due to her lack of driving skills and, in particular, the fact that she was unable to drive to concerts at away locations. The tribunal held that she had been treated less favourably for a reason relating to her disability under s 5(1).¹⁵ Similarly, in *Fozard v Greater Manchester Police Authority*¹⁶ the applicant had had learning difficulties as a child which resulted in her having reduced manual dexterity. She applied for the position of temporary word processor operator but was rejected on the basis of the spelling and grammatical errors in her application form. The tribunal held that the applicant was rejected, at least in part, for a reason related to her disability.

It is not clear how close the causal connection has to be for a reason to be related to an applicant's disability. In *Champeau* the applicant could not drive because she was partially sighted and in *Fozard* the mistakes in the applicant's application form were a result of her lack of manual dexterity. However, it is possible to envisage cases where the causal link is less close. For example, an applicant is not offered a job because he or she does not have a GCSE in biology. Because of his or her disability, the applicant went to a special school where biology was not offered as an option. Was the applicant rejected for a reason that relates to his or her disability? In terms of the chain of causation the 'primary' reason for the applicant's lack of a biology GCSE is the fact that the school did not offer biology as an option. The fact that the applicant had to go to that school because of his or her disability makes the disability a 'secondary' link in the chain of causation. Whether s 5(1) requires a 'primary' causal connection as opposed to a 'secondary' causal connection is ultimately a matter that will have to be decided by the courts. Given that the employer still has the option of justifying the treatment, the courts are likely to interpret the section very widely and allow in all but the most remote causal connections.

What kind of disability characteristics are covered by s 5(1)? For the reasons explained above, disability per se must relate to a unique disability characteristic. An applicant dismissed because she has a psychosis is dismissed for a reason that is unique to disabled people but it is not a reason that is shared by all disabled people. With regard

¹⁴ 20.2.98, Case No.3103546/97, reported in IDS Brief 611, p.16.

¹⁵ See also *Morse v Wiltshire County Council* [1998] IRLR 352, EAT, a case in which the applicant was dismissed because of his lack of flexibility, one aspect of which was his inability to drive.

¹⁶ COIT 3488/35, reported in IDS Brief 601, p 11.

to disability related reasons, most, if not all, of these will relate to characteristics that have a disproportionate impact on disabled people. For example, in relation to the above cases, an inability to drive, spelling and grammatical errors, and absence from work are all characteristics that can apply to disabled and non disabled people alike but they are more likely to apply to disabled people. As a result, they are all distribution disability differences. Any characteristic that is causally linked to an applicant's disability is likely to be one that affects more disabled people than non-disabled people. In practice, it is difficult to identify any reason related to disability that is not a distribution difference although it is possible that some exist. Thus, the result is that s 5(1) covers both unique and distribution disability differences.¹⁷

Finally, the code of practice makes it clear that s 5(1) also covers the use of disability stereotypes. An example given by the code is the situation where an employer does not shortlist a blind person for a job involving computers because it thinks that blind people cannot use them (para 4.6). An example from the case law of a disability stereotype is *British Sugar plc v Kirker*¹⁸ where the applicant was viewed as having less of a future with the respondent because he was blind rather than on the basis of his actual abilities.

REASONABLE ADJUSTMENT

The second form of discrimination contained in the DDA deals with the obligation on the employer to make reasonable adjustments in order to accommodate the special needs of disabled employees. The duty of the employer to make adjustments is contained in s 6 which states:

- (1) Where-
 - (a) any arrangements made by or on behalf of the employer, or
 - (b) any physical feature of premises occupied by the employer,
- place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such

¹⁷ One difference between the treatment of distribution differences in sex discrimination and in disability discrimination is that in relation to the latter, there is no need for the applicant to demonstrate disproportionate impact. The difficulty of assessing disproportionate impact on disabled people given that they are not a homogeneous group is one of the main reasons why the Government decided not to adopt an exact disability equivalent of indirect sex discrimination: Department of Social Security, *A consultation on government measures to tackle discrimination against disabled people*, (1994) p 27.

¹⁸ [1998] IRLR 624, EAT.

steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect.

(2) Subsection (1)(a) applies only in relation to -

(a) arrangements for determining to whom employment should be offered;

(b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.¹⁹

The duty to adjust arises whenever the arrangements made by the employer or the physical features of the employer's premises place the disabled person at a substantial disadvantage. The code of practice indicates that substantial in this context means not minor or trivial (para 4.17). The example given by the code is that an employer would not be required to widen a doorway for an employee with a wheelchair if there is an easy alternative route to the same destination.

A failure to make an adjustment in accordance with s 6 is rendered discriminatory by virtue of s 5(2).²⁰ In addition, the employee must show that the failure to adjust has resulted in one of the prohibited acts covered by s 4. In other words, it is not enough for a disabled employee to show that his or her employer has failed to make a reasonable adjustment under s 6. The employee must also demonstrate that that failure has resulted in a lost job opportunity, less favourable working conditions, dismissal or some other detriment.²¹ For example, an employee with arthritis in the hands is unable to type as fast as other non-disabled employees. A small change in the employee's duties would remove the need to type. Despite the fact that the adjustment is reasonable the employer is unwilling to make the change because it is unconcerned by the fact that the employee is slightly less productive than other employees. Unless the employee can show that his or her lack of productivity is detrimental in some way, eg it could have an impact on the individual's promotion prospects, the employer's failure to adjust would not constitute discrimination under s 5(2).

¹⁹ These words are wide enough to cover pre-dismissal discrimination but not the dismissal itself: see *Clark v TDG Ltd* [1999] IRLR 318, CA and *Morse v Wiltshire County Council* [1998] IRLR 352, EAT. The words are not wide enough to cover the provision of a carer to attend to an applicant's personal needs such as assistance in going to the toilet: see *Kenny v Hampshire Constabulary* [1999] IRLR 76, EAT.

²⁰ A failure to adjust does not create an independent cause of action. It only imposes duties for the purpose of determining whether an employer has discriminated against a disabled person (s 6(12)). The duty to make a reasonable adjustment does not apply to a benefit under an occupational pension scheme in respect of termination of service, retirement, old age, death, accident, injury, sickness or invalidity (s 6(11)).

²¹ See B Doyle, above, p 69. The same is true of sex discrimination. The applicant must show that he or she has suffered from one of the forms of less favourable treatment specified in s 6 of the SDA.

Section 6(3) gives some examples of adjustments that an employer may have to make. The list includes allocating some of the disabled person's duties to another employee, altering working hours, moving the disabled person to another place of work, training, acquiring or modifying equipment, providing a reader or interpreter and modifying procedures for testing or assessment. The duty to adjust is not an absolute one but is subject to the test of reasonableness. Section 6(4) sets out five factors that must be taken into account in determining whether it is reasonable for an employer to take a particular step.²² The five factors indicated are-

- the extent to which taking the step would prevent the effect in question
- the extent to which it is practicable for the employer to take the step
- the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities
- the extent of the employer's financial and other resources
- the availability to the employer of financial or other assistance with respect to taking the step

An example of a case in which the tribunal held that it was not reasonable for an employer to make an adjustment is *Smith v Carpets International UK plc*.²³ The applicant, who was an epileptic, was employed in a warehouse. After he had a number of seizures at work the respondent's doctor concluded that he should not be allowed to work in the warehouse because the heavy machinery and the fork-lift trucks were potentially dangerous to him. The applicant was offered alternative work in another department which he declined because it involved a significant pay cut. The tribunal held that it would not have been reasonable for the employer to have changed its method of work eg by removing fork-lift trucks from the warehouse so that the applicant could continue to work there.

By way of contrast, a case in which an employer did fail to make a reasonable adjustment is *Williams v Channel 5 Engineering Services Ltd*.²⁴ The applicant, who was deaf, was training to be a re-tuner. Part of his training involved watching a video. The respondent's failure to provide him with a video with sub-titles meant that he finished his training late. Further delay was caused by the respondent's failure to consider whether

²² There is a power to make regulations under ss 6(8) and (9) specifying the circumstances in which particular adjustments are or are not reasonable and to put a ceiling on the cost of any adjustments.

²³ IDS Brief 611, p 17.

²⁴ IDS Brief 609, p 13.

the applicant needed additional equipment, eg a pager, to help him communicate with his employer. As a result, all the positions for re-tuners had been filled by the time the applicant was able to start work. The tribunal held that the respondent's failure to provide the applicant with the necessary equipment in a timely manner amounted to a failure to make a reasonable adjustment.

What kind of disability characteristics are covered by the duty to adjust? The duty arises whenever the arrangements made by the employer or the physical features of the employer's premises place the disabled person at a substantial disadvantage *in comparison with persons who are not disabled*. The requirement of a comparison with a non-disabled person means that the disadvantage must be one that is causally connected to the applicant's disability. There is no duty to adjust if the disadvantage is unrelated to the applicant's disability. For example, a deaf person is turned down for a job because he or she is too short. The successful candidate is of the requisite height but is not disabled. In comparison to the successful candidate, the disabled person has been placed at a disadvantage in not being offered the job. However, the disadvantage is not causally related to the applicant's disability and, as a result, the employer is under no obligation to drop the height requirement. If the duty to adjust only arises where there is a causal link between the disadvantage and the applicant's disability, the disability differences covered are the same as those covered by s 5(1). In other words, the duty to adjust applies to unique and distributions differences. Thus, the two forms of disability discrimination cover the same range of disability differences.

JUSTIFICATION

Less favourable treatment and a failure to adjust can both be justified by an employer. Although the two justification defences are virtually identical in their wording, there are slight differences in the way in which they operate and, therefore, they are considered separately below.

Justification of less favourable treatment

Less favourable treatment of a disabled person is only unlawful if the employer cannot show that the treatment in question is justified (s 5(1)(b)). Treatment is justified "if, but

only if, the reason for it is both material to the circumstances of the particular case and substantial" (s 5(3)). However, an employer must first comply with its duty to make a reasonable adjustment before it can seek to justify any less favourable treatment *unless* the treatment would have been justified even after that adjustment (s 5(5)). One of the examples given in the code of practice is of a typist with arthritis in the hands dismissed for a slow typing speed. The dismissal would not be justified if the typist's speed could have been improved by a reasonable adjustment, eg the use of an adapted keyboard (para 4.7).

In determining whether the reason is material and substantial the tribunal must apply an objective test. Thus, it is not sufficient for the employer to establish that it acted reasonably in concluding that the treatment was justified. The tribunal must decide for itself whether the reason is material and substantial and may substitute its own judgement for that of the employer.²⁵

Material

The word material is not defined in the DDA. According to the code of practice a reason is material if it relates to the individual circumstances in question (para 4.6).²⁶ For example, it would probably not be justified for an employer to refuse employment to a disabled person on the ground that he or she is unable to drive if the ability to drive is not a requirement of the job. By contrast, the code of practice indicates that it would be lawful to reject an individual with a severe skin condition for a job modelling cosmetics as this would be a reason that is material to the individual circumstances in question (para 4.6).

What impact does the requirement of materiality have on the use of disability stereotypes? By definition, disability stereotypes are generalised assumptions about the effect of a particular disability on an individual's ability to work, eg an employer may assume that epileptics are unable to drive. The code of practice indicates that the use of a

²⁵ *Morse v Wiltshire County Council* [1998] IRLR 352, EAT. This is contrast to the position under s 24 of the DDA (disposal of premises) where less favourable treatment can be justified on the basis of a reasonably held opinion: *Rose v Buchet* [1999] IRLR 463, Sheriff Court.

²⁶ The word material also arises in the EPA. Under 1(3) of the EPA an employer can defend a difference in pay if the variation is genuinely due to a material factor which is not the difference of sex. Material has been construed in this context as meaning "significant and relevant": *Rainey v Greater Glasgow Health Board* [1987] ICR 129 at 140, HL.

disability stereotype cannot be justified because it is not material to the particular circumstances of the case. The code of practice gives the following example of the unjustified use of a disability stereotype about blind people.

Someone who is blind is not shortlisted for a job involving computers because the employer thinks blind people cannot use them. The employer makes no effort to look at the individual circumstances. A general assumption that blind people cannot use computers would not in itself be a material reason - it is not related to the particular circumstances (para 4.6).

The approach of the code of practice to disability stereotypes was followed by the tribunal in the case of *Sandy v Hampshire Constabulary*.²⁷ The applicant was refused employment as a station enquiry officer because, in the view of the force's medical officer, the applicant's back condition would result in an unacceptably high level of absence. No account was taken of the fact that the applicant had previously worked for the force on a series of temporary contracts for 13 months during which time he had had only five days of sickness absence, none of which was related to his disability. The tribunal held that the failure of the medical officer to refer to the applicant's actual sickness record rendered the force's decision "speculative and inaccurate" and, as a result, it could not be justified.²⁸

In both the example given by the code of practice and the above case the underlying supposition was that the assumption made by the employer was inaccurate in relation to the particular applicant. In the example given by the code the implication is that the applicant in question could use computers despite being blind. In *Sandy* the tribunal indicated that the police force's decision about the applicant's likely sickness absence was inaccurate. It is not clear what the position is with regard to assumptions that turn out to be correct even if they are no more than a lucky guess on the part of the employer rather than an informed decision based on actual evidence about an applicant's capabilities. For example, an employer may refuse to employ an applicant with RSI because it assumes that all people with RSI are unable to type. Although the employer's assumption may not be true of all individuals with RSI, it may be accurate in relation to this particular applicant. Does this make the employer's assumption material to the

²⁷ EOR Discrimination Case Law Digest No 34, Winter 1997, p 2.

²⁸ See also *Glynn v London Transport* EOR Discrimination Case Law Digest No 40, Summer 1999, p 12, where the applicant was rejected on the basis of information on his application form without any further investigation by the employer.

particular circumstances of the case? It is not clear what the answer to this question is as it is not covered by the DDA, the code of practice or the case law. The better interpretation is probably that the assumption is not material and, therefore, the employer cannot justify the decision. This is because one of the aims of the DDA is to ensure that employers act on actual information about people with disabilities rather than stereotypical assumptions. For example, paragraph 3.2 in the general guidance section of the code is headed: "Do not make assumptions". If employers are able to justify decisions on the basis of untested assumptions this would clearly undermine the attempts of the legislation to ensure that employers investigate the facts before reaching a decision.²⁹ However, the applicant's loss is likely to be limited to damages for injury to feelings as it would probably be difficult to prove that the applicant had suffered any economic loss as a result of the employer's assumption.

Another facet of the materiality requirement is that the employer must ensure that it has taken appropriate medical advice on the applicant's condition and its effect on his or her ability to work. This point was made in the case of *Holmes v Whittingham & Porter*.³⁰ The applicant, who was an epileptic, collapsed at work. Despite the fact that he had never collapsed before in his 31 years of service as a labourer he was dismissed on the basis of an investigation by a general practitioner. The tribunal held that the employer was not justified in dismissing the applicant on the basis of the general practitioner's report. The employer should have addressed its mind to taking further advice from a specialist in epilepsy and a specialist in occupational medicine.³¹

Substantial

As with the word material, the expression substantial is not defined in the DDA. The code of practice indicates that a reason is substantial if it is not just "trivial or minor" (para 4.6). The examples given by the code of practice of treatment which would probably not be justified all involve a relatively small impact on the employer. For

²⁹ An analogy with sex discrimination legislation would be an employer who rejects a woman's application for a job because of an assumption that women lack the necessary mathematical skills to do the job. Even if it turned out that this particular woman did not have the mathematical skills to do the job, the employer's behaviour would probably be classified as directly discriminatory.

³⁰ EOR Discrimination Case Law Digest No 34, Winter 1997, p 3.

³¹ Arguably this goes slightly further than the code of practice which states that: "The Act does not oblige anyone to get expert advice but it could help in some circumstances to seek independent advice on the

example, paragraph 4.6 of the code gives the following example of a clerical worker with a learning disability.

A clerical worker with a learning disability cannot sort papers *quite as quickly* as some of his colleagues. There is *very little difference* in productivity but he is dismissed. That is unlikely to be a substantial reason. (emphasis added)

Another example given by paragraph 4.6 deals with absence from work.

A factory worker with a mental illness is sometimes away from work due to his disability. Because of that he is dismissed. However, the amount of time off is *very little more* than the employer accepts as sick leave for other employees and so is very unlikely to be a substantial reason. (emphasis added)

Thus, unlike cases of indirect sex discrimination, justification of less favourable treatment does not appear to involve any balancing act between the interests of the employer and the employee. Nor does it seem to require the financial interests of the employer to be taken into account. All the employer is obliged to do is to satisfy the tribunal that, on an objective assessment, the applicant's disability is likely to have a detrimental impact on the business that is more than just minor or trivial.

Due to the recent nature of the DDA, there have not been enough reported cases to permit a proper analysis of how the word substantial has been applied by the courts. However, it is possible to gain some insight from the relatively few cases that have been reported. These cases seem to fall into three main categories, namely sickness absence, productivity problems or a risk to health and safety. With regard to sickness absence, the courts appear to have taken a fairly robust approach. For example in *Cox v The Post Office*³² the applicant postman was dismissed because of his poor attendance record. Over a period of 13 years he had 111 days' absence due to asthma in addition to his other sickness absence. The asthma absence amounted to an average of 8.5 days a year at a cost of £291 per annum. The tribunal found that there was neither evidence of disruption to the business nor was it an unreasonable burden for the respondent to cover the applicant's absences. As a result, the dismissal was not justified.³³ This case indicates that tribunals may take the size of the respondent's business into account in determining whether a decision is substantial. The implication being that large companies will be obliged to accommodate more sickness absence than small companies.

extent of a disabled person's capabilities." (para 3.3)

³² IDS Brief 609, March 1998, p 14.

³³ See also *Mansoor v Secretary of State for Education and Employment* IDS Brief 611, April 1998, p 16

The second category, productivity problems, provides some examples of cases where tribunals have found that the reason for the less favourable treatment was substantial enough to be justified. In *Matty v Tesco Stores Ltd*³⁴ the tribunal held that the employer was justified in not employing the applicant diabetic as a fitter in its warehouse. One of the factors that the tribunal took into account was the fact that if the refrigeration system failed stock worth millions of pounds could be lost.³⁵ Another example is *Fozard v Greater Manchester Police* (above) where the tribunal accepted that the spelling and grammatical errors in the applicant's application form justified the respondent's decision to refuse her employment as a word processor operator. However, as both of these cases represent fairly substantial losses of productivity they are not particularly informative on where tribunals are likely to draw the line in cases where the loss is less pronounced.

There have been several cases where the applicant's disability has given rise to a health and safety risk to the applicant, other employees or members of the public. It seems that if an employer can identify a health and safety risk, a tribunal is likely to accept the reason as substantial even if it is remote or difficult to quantify. For example, in *Alvares v London Borough of Hounslow*³⁶ the tribunal held that the respondent was justified in dismissing the applicant from his post as a school technician because his auditory hallucinations and fantasies about mass murder posed an incalculable risk to the staff and pupils at the school. Similarly, in *Toffel v London Underground Ltd*³⁷ the tribunal held that the respondent was justified in refusing to employ the applicant as a train guard because the side effects of the drug he was taking for his depression might have posed a serious risk to passengers.

The lack of reported and, in particular, appeal cases on the meaning of the word substantial means that it is difficult to assess its impact. The code of practice indicates that substantial requires no more than a minor or trivial impact on the employer's business. However, there is some evidence that in one area at least, sickness absence,

and *Kerrigan v Rover Group Ltd* EOR Discrimination Case Law Digest No 40, Summer 1999, p 11.

³⁴ IDS Brief 609, March 1998, p 13.

³⁵ Another factor in this case was the impact of an irregular working pattern and working in low temperatures on the applicant's blood/sugar levels.

³⁶ EOR Discrimination Case Law Digest No 37, Autumn 1998, p 12.

³⁷ IDS Brief 609, March 1998, p 13.

tribunals are imposing a slightly higher test that is more difficult for employers to comply with.

Justification of a failure to adjust

The justification defence for a failure to adjust is virtually identical to the justification defence for less favourable treatment. A failure to adjust is justified "if, but only if, the reason for the failure is both material to the circumstances of the particular case and substantial" (s 5(4)). Given the similar wording of the two defences, the points made above about the meaning of the words material and substantial also apply in relation to a failure to adjust.

The justification provision only applies if there was a reasonable adjustment that the respondent could have made in the first place (para 4.34 of the code of practice). Thus, if the tribunal finds that there was no reasonable adjustment that the respondent could have made the question of justification does not arise.³⁸ So far there has been no reported case in which an employer has managed to justify its failure to make a reasonable adjustment. In most instances where the employer has succeeded in defending a claim under s 5(2) the tribunal has found that the adjustment was not reasonable in the first place and, as a result, the question of justification has not arisen.³⁹ In what situations could the defence apply? The code of practice gives three examples of situations in which an employer might be justified in failing to make a reasonable adjustment (para 4.34). The first example is where an employer has made a reasonable effort to obtain information from a reputable source but is given the wrong information. According to the code this could justify the employer's failure to comply with its duty to adjust. The other two examples given by the code of practice both involve a failure to co-operate on the part of the disabled employee. However, the code also indicates that a failure to co-operate by a disabled employee could be a factor that is relevant to the question of reasonableness (para 4.32). This seems to imply that the same factor might be relevant both to reasonableness and justification. There is nothing in the DDA that expressly prevents an employer from using the same argument twice. However, it is difficult to think of any factor that is likely to be accepted by a tribunal at the justification

³⁸ The tribunal should consider the question of reasonableness before the question of justification: see *Kenny v. Hampshire Constabulary*, [1999] IRLR 76, EAT.

stage if it has already been rejected at the reasonableness stage. If this is correct, the justification provisions for a failure to adjust are likely to be of limited application.

Deemed justification

Regulations made under s 5(6) stipulate a number of circumstances in which less favourable treatment or a failure to adjust are deemed to be justified.⁴⁰ Regulation 3 deals with performance related pay. It is deemed to be justified for an employer to pay a disabled person less if that person's pay is wholly or partly dependant on performance and the scheme applies to all the workers in the same class as the disabled employee. This does not affect the duty on the employer to make any reasonable adjustment which would improve the performance of the disabled person.

Regulations 4 and 5 deal with benefits under occupational pension schemes in respect of termination of service, retirement, old age, death, accident, injury, sickness or invalidity. It is always justified to treat a disabled person less favourably in relation to the eligibility for or the amount of any of the above benefits if the cost of providing the benefit is *substantially greater* than it would be for a non-disabled person (reg 4(2)). The code of practice makes it clear that a minor degree of extra cost is not enough. Substantial additional cost is required and this means something more than minor or trivial. Employers should satisfy themselves with medical and/or actuarial evidence of the likelihood of there being a substantially greater cost (paras 6.10 to 6.14). Furthermore, it is justified for an employer to require a disabled person to pay the same level of contributions as a non-disabled person despite the fact that he or she is not eligible for a benefit or the same level of benefit for a reason related to his or her disability (reg 5).

THE SCOPE FOR JUSTIFYING DIRECT DISABILITY DISCRIMINATION

What scope is there for justifying direct disability discrimination under the DDA? This depends on how unique disability differences are classified. If detrimental treatment on the basis of unique disability differences is considered to be indirect discrimination, the

³⁹ See for example *Smith v Carpets International UL plc*, above.

⁴⁰ The Disability Discrimination (Employment) Regulations 1996, SI 1996 No 1456.

answer is that there is no scope for justifying direct disability discrimination. This is because the only form of direct disability discrimination that exists is the use of disability stereotypes. Although in theory the general justification defence applies to stereotypes, the code of practice states that the decision must be specific to the case in question. As stereotypes are by definition generalised assumptions about an individual on the basis of group membership they can never be specific. The one exception is in relation to the use of actuarial factors in the context of benefits under an occupational pension scheme in relation to which there is a separate exception. Thus the position is that, there is effectively no scope for justifying direct disability discrimination. On the other hand, if detrimental treatment on the ground of a unique disability difference is classified as giving rise to a claim of direct discrimination, there is plenty of scope for justifying that discrimination. Both forms of disability discrimination cover unique and distribution differences and both forms of discrimination can be justified. Therefore, detrimental treatment on the ground of any unique disability characteristic can be justified.

Leaving aside the question of whether unique disability differences should be classified as direct or indirect discrimination, why did the Government decide that employers should be able to justify their use? In a consultation paper issued before the DDA was passed, the Government indicated that disability discrimination would need to be formulated differently from race and sex discrimination for the following reason.⁴¹

[The] right would need to recognise that a disability which affected a person's basic ability to do the job would be a reason why an employer might be acting fairly in deciding not to recruit the person. Another reason would be whether health and safety could not be safeguarded so far as was necessary. In both these respects, the legislation would need to be formulated differently from that on race and sex discrimination.

In other words, the Government accepted that both types of disability characteristic which can occur may have an impact on an individual's ability to work. Therefore, unless the Government wanted the position to be that employers should always have to accommodate these differences no matter how absurd their impact (eg a blind lorry driver) there had to be some form of justification defence that covered both forms of disability discrimination.

⁴¹ *A consultation on government measures to tackle discrimination against disabled people*, (1994) para 2.27.

The result is that an anomaly has arisen between sex and disability discrimination. There is no logical reason why some unique sex differences should receive a greater degree of protection than unique disability differences, particularly where the impact on the employer is almost identical. For example, an employer cannot justify dismissing a pregnant woman on the ground that it cannot accommodate her requirements for maternity leave. On the other hand, if a disabled person requires a similar period of time off work, eg for an operation, there is scope for an employer to justify the dismissal.

SEX AND DISABILITY JUSTIFICATIONS COMPARED

To what extent is there an overlap between disability justification and the justification defence for indirect sex discrimination? To recap, there are three elements to the justification defence for indirect sex discrimination: the reason test, the causation test and the proportionality test. Under the reason test the employer has to identify the reason for a particular practice. For example, an employer may argue that full-time working is required in order to maintain productivity. Under the causation test the employer has to prove that there is a causal link between the reason and the practice complained of. Thus, in the above example, the employer would have to show that there is indeed a causal link between full-time service and productivity. Finally, there are the two parts of the proportionality test. First, the employer must persuade the court that there is no non-discriminatory way of obtaining the same objective. Secondly, the tribunal has to balance the detriment to the employee and the benefit to the employer. Thus, if an employee is dismissed for refusing to work full-time the tribunal has to balance the detriment of a lost job against the increased productivity of the employer.

With disability discrimination the justification defence is essentially the same for both forms of discrimination. In both cases the treatment can be justified for a reason that is material to the circumstances of the particular case and is also substantial. However, the justification test must be read in conjunction with the duty to adjust. This is because an employer must first comply with its duty to adjust before it can justify any less favourable treatment. Thus, if an employer wishes to dismiss a disabled employee because of reduced productivity, it must first show that it has taken all reasonable steps

to improve the employee's productivity. Taken together, the duty to adjust and disability justification have much in common with the justification defence for indirect sex discrimination. The exact scope of the similarities and differences between the two defences is examined below.

The reason test

In cases of indirect sex discrimination the employer has to identify a reason for the disputed practice or measure that is unconnected with sex. As indicated in chapter 5, the case law has set various parameters for the kind of reason the employer can rely on, eg the reason must correspond to a real need on the part of the employer. The corresponding provision in the disability justification defence is that the reason must be material. Because the case law on disability discrimination is not as developed as the case law on indirect sex discrimination, it is not possible to identify the precise parameters of the materiality requirement. However, the code of practice and the limited case law to date both indicate that the requirement of materiality imposes a test of relevance to the employer's business. Thus, the requirement of materiality is likely to have much the same impact as the reason test for cases of indirect sex discrimination.

With indirect sex discrimination the reason must be other than sex. Although it is not expressly stipulated that justification of disability discrimination must be for a reason other than disability, it is arguable that this is implicit in the test of relevance imposed by the requirement of materiality. If the test of relevance means that the employer must put forward a reason that is relevant to the needs of the business, there is little if any scope for employers to use disability as a reason as this would amount, for example, to an employer attempting to justify a refusal to hire a deaf person as a telephonist on the basis that he or she is deaf. This is not a reason that relates to the needs of the business. Instead, the employer would have to use as a reason the effect on productivity of hiring a deaf person to do that particular job. In which case the reason would be productivity and not disability. Overall, the requirement of materiality is likely to bear a considerable resemblance to the reason test for indirect sex discrimination. This means that there will be a substantial overlap between the kind of reasons that can be used for justifying disability and indirect sex discrimination.

The causation test

The second element of the objective justification defence for indirect sex discrimination requires the employer to demonstrate a causal link between the measure causing the disproportionate impact on one sex and the reason put forward for the measure. Although it is not expressly stated in the legislation, it is inherent in the materiality requirement that the causation test also applies to disability justification. If a disabled employee is dismissed because he or she is unable to drive, the employer must show that an inability to drive results in the specified reason eg a reduction in productivity. Thus, the causation element is the same for both justification defences.

The proportionality test

The first element of the proportionality test for indirect sex discrimination is the means test. A similar requirement is found in disability discrimination in the duty to adjust. In both cases the tribunal has to consider whether the employer's objective could have been achieved in a less discriminatory way. The difference is that with disability the legislation sets out a very detailed test for determining whether it is reasonable for an employer to take a particular step. The five factors that the tribunal must take into account are set out in s 6(4). They include the effectiveness of the adjustment in question, the cost of the adjustment (including the cost of any disruption to the employer's business) and the ability of the employer to accommodate the cost (given the availability of any financial assistance). By contrast, there are no legislative guidelines for the application of the means test in cases of indirect sex discrimination. It is left to the discretion of the tribunal to decide what factors should be taken into account in deciding whether there are alternative non discriminatory means available for achieving the employer's objective.

Which approach is better? Although the sex discrimination approach gives tribunals more flexibility, the disability approach has several advantages. First, the DDA clearly places the obligation on the employer to look for alternative ways of solving the problem. With indirect sex discrimination, unless the applicant comes up with an alternative solution, there is a danger that the means test will be overlooked. Second, the DDA makes it clear that employers are expected to spend money accommodating the

needs of disabled employees although how much money is reasonable depends on the size and resources of the employer. With indirect sex discrimination there is a danger that employers will be able to convince tribunals that they should not be obliged to introduce changes such as part-time work because they involve additional costs. Third, the existence of the guidelines in the DDA means that employers are more likely to be aware of their obligations and, therefore, comply with them and it makes it easier for disabled employees to understand and enforce their rights. With indirect sex discrimination the exact scope of the means test is hidden away in the case law making it difficult for employers to know exactly what their obligations are and hard for employees to know and enforce their rights.

The point where the two justification defences diverge significantly is in relation to the second element of the proportionality test. With indirect sex discrimination the tribunal has to balance the detrimental effect on the applicant with the benefit to the employer. There is no similar requirement with disability. Instead, the tribunal merely has to be satisfied that the reason put forward by the employer is substantial. The word substantial is not defined in the DDA but the code of practice indicates that a reason is substantial if it is not just minor or trivial. There have been insufficient reported cases on this point to enable a detailed examination of how the provision has been applied in practice. However, the few reported cases on sickness absence indicate that tribunals may be giving the word substantial a slightly more robust meaning. The indirect sex discrimination cases are not particularly clear on this point, but it seems that employers are expected to accommodate something more than a small drop in productivity. Thus, with regard to this final element, it appears that the disability justification defence is somewhat weaker than the justification defence in cases of indirect sex discrimination. It will be impossible to ascertain whether this is indeed the case until there has been considerably more case law on the disability justification defence. However, if a weak form of justification is adopted in disability cases this could lead to peculiar anomalies in cases where the distribution characteristic in question is equally applicable to sex cases. For example, it would be somewhat incongruous if an employer is obliged to accommodate part-time working for a woman with children but not for a disabled person who is unable to work full-time due to ill health.

CONCLUSION

There is a tendency amongst some writers and the courts to view less favourable treatment under s 5(1) of the DDA as the equivalent of direct sex discrimination. This has given rise to the impression that there is more scope for justifying disability discrimination than sex discrimination. In fact, an analysis of sex and disability discrimination in terms of categorical, unique and distribution differences reveals that there is considerable overlap in the application of the justification defence. There is no difference in the treatment of categorical differences because they simply do not exist in the context of disability discrimination. In relation to distribution differences, the justification defence applies to both disability and sex.

The one area of divergence arises in relation to unique differences. With disability, all unique differences are subject to the justification defence. With sex, all unique differences can be justified other than pregnancy and maternity. Thus, the disability provisions offer less protection to a disabled person than the provisions on direct sex discrimination offer to a pregnant woman or a woman on maternity leave. There is no logical basis for this anomaly as both unique disability differences and unique sex differences can have an impact on an individual's ability to work.

Taken together with the duty to adjust, disability justification has much in common with the justification defence for indirect sex discrimination. The one area where disability justification could be said to be more effective than justification for indirect sex discrimination is in relation to the means test. Unlike indirect sex discrimination where the exact nature of the employer's obligation to accommodate the special needs of the sexes is not fully articulated, the duty to adjust in disability discrimination sets out the factors that a tribunal must take into account in determining whether an adjustment is reasonable. These factors make it clear that employers are obliged to make changes despite the fact that there may be some cost involved and it has the added advantage that it makes the provision easier for employers and employees to understand. On the other hand, disability justification appears to be weaker than justification for indirect sex discrimination in relation to the balance element of the proportionality test. With indirect sex discrimination tribunals are obliged to balance the detriment to the employee against the benefit to the employer. With disability

justification the employer just has to satisfy the tribunal that it has a substantial reason for the discriminatory treatment which, according to the code of practice, means a reason that is not just minor or trivial.

A MODEL JUSTIFICATION DEFENCE FOR DIRECT SEX DISCRIMINATION

INTRODUCTION

The previous two chapters have examined justification defences for indirect sex and disability discrimination. This chapter moves on to consider how some elements of these defences could be combined to create a model for a statutory justification defence for direct sex discrimination. As indicated in the Introduction, the purpose of postulating this model is to explore what impact such a defence would have on the dual goals of sex equality and clarity of the law. This is an impact study, not an examination of the normative question of whether this defence is politically desirable; such an inquiry is not amenable to legal analysis and falls outside the scope of this thesis.

The model defence described below seeks to achieve two things. First, to create an appropriate balance between the underlying aim of sex equality and the right of organisations to operate efficiently and profitably. It must be emphasised that the model represents just one of a range of possible formulations; where exactly the balance should be struck is ultimately a political question to be resolved by legislators. The second aim of the model is to set out a comprehensive list of the factors that courts and tribunals must address in reaching a decision – thereby maximising legal clarity.

The model adopts the three elements of the defence used in indirect sex discrimination cases except that the third element is divided into two, so creating a four stage test. Each of the stages is analysed in detail below. Afterwards, the defence is applied to three instances of direct sex discrimination to illustrate how the defence would work in practice. Finally, the overlap with the main existing legislative exceptions is considered.

THE JUSTIFICATION DEFENCE

The reason test

The first stage of the defence is the reason test. The respondent must put forward a reason for the difference in treatment. Not every reason will suffice. It must be one that

relates to the operational needs of the employer's business or organisation. This means that mere whims are excluded as are reasons that are extraneous to the respondent's organisation. This does not mean that all social considerations are excluded. An employer can put forward a social benefit as a reason as long as it relates to the operation of the business. For example, the objective of a rape crisis centre is to help rape victims rather than make a profit for the centre. Thus, it may seek to justify hiring only female counsellors on the basis that the purpose of the organisation can be more effectively achieved. On the other hand, a rape crisis centre could not justify a decision to hire female cleaners on the basis that it will help to reduce female unemployment as the aim of reducing female unemployment is not related to the purpose of the organisation.

Slightly different considerations would apply where the provision being challenged is enshrined in legislation. Adopting the test used in the justification of indirect sex discrimination, where a legislative provision is being challenged (eg in judicial review proceedings) all that the Government has to show is that the reason relates to a legitimate social aim. Thus, if the Government passes a law that stipulates all employers with more than 1000 employees must establish a free workplace nursery for the children of its female staff, the only issue for the tribunal would be whether the provision of free childcare to working women is a legitimate social aim. As the cases on indirect sex discrimination indicate, this will not be a difficult hurdle for the Government to overcome.

The reason put forward by the employer must be the real or genuine reason for the difference in treatment ie it must not be a sham or pretence.¹ For example, an employer may claim that the reason for not employing women as security guards at a night club is that they do not have the physical strength to eject rowdy guests. However, the real reason for the difference in treatment is that the existing male security guards object to working with women. As the employer's reason is not genuine the defence fails. Does the reason have to be a good or material reason? In other words, is there any quality control over the reason put forward? For example, an employer claims that the reason why it employs only women at the cosmetics counter of its store is that women can model the cosmetics they are selling which then encourages customers to buy the

¹ A similar requirement of genuineness applies to the genuine material factor defence under s 1(3) of the EPA: see *Strathclyde Regional Council v Wallace* [1998] IRLR 146, HL.

products. Should the tribunal look at the reason and decide whether it is a good enough reason to give rise to a justification defence? The answer is probably not because this would pre-empt the other elements of the defence. In order to determine if the reason is a good reason the tribunal would have to examine whether the ability to model the products does indeed increase sales and, if so, by how much. These are questions that are dealt with by the causation test and the balance test. Thus, the tribunal should not, at this stage, consider the quality of the reason. All that is required is that the reason should be genuine and should relate to the needs of the business.

To what extent can the reason relate to sex? In contrast to the justification defence for indirect sex discrimination, it would be permissible for the reason to be sex related. This does not mean that the use of sex related reasons is unrestricted because the reason must still be one that relates to the needs of the business. For example, an employer cannot justify a refusal to hire women simply because they are women since this is not a reason that relates to the needs of the business. However, if an employer can point to a sex difference that has an impact on the operation of the business this could give rise to a justification defence.

Where an employer puts forward a reason that is based on a distribution sex difference it will almost certainly be invoking a sex stereotype. Thus, an employer who refuses to hire women on the ground that they are not strong enough to do the job is relying on a sex stereotype about the relative strengths of women and men. An employer who puts forward a reason based on a unique characteristic might also be relying on a sex stereotype. For example, an employer who refuses to hire young women on the basis that they may get pregnant and leave is invoking a sex stereotype about the behaviour of young women. (An employer who dismisses a woman who is already on maternity leave and, therefore, cannot work, is relying not on a stereotype but on actual information about her inability to work.) This does not mean that employers are given a free rein to use sex stereotypes. In chapter 3, two factors were identified for the rational use of stereotypes. First, the stereotype must be relatively accurate. Second, there must be an absence of reasonably accessible information about the individual that would negate the stereotype. It is only if both of these conditions are satisfied that it is rational to rely on a sex stereotype. Both of these factors are tested in the remaining elements of the justification defence. The accuracy of the stereotype is tested as part of the causation

element of the test. If the stereotype is not accurate the employer will not be able to show a causal link between the reason and the detrimental treatment. The availability of individuating information is examined under the means test. If information about an individual that contradicts the stereotype is reasonably accessible, the employer may have alternative non-discriminatory means of achieving the same objective. The impact of the causation test and the means test on sex stereotypes is discussed in more detail below.

The causation test

Under the causation test the employer has to establish a causal connection between the disputed measure and the reason put forward for the measure. For example, a respondent may try and justify a dress code under which women sales assistants are prohibited from wearing trousers on the basis that this would result in a loss of sales. In this situation the employer must prove that there is a causal link between the dress code and the level of sales. In other words, unless the employer can actually show that customers are put off buying by women in trousers, the justification defence fails. It is very important that where the impact of a particular measure is quantifiable, employers provide actual evidence of its effect. Tribunals should not be willing to accept an employer's assertion that the causal link is self evident. Where the impact of a measure is not readily quantifiable employers should be required to put forward tenable evidence that the causal link exists. Thus, in the above example of a dress code, one way the employer could establish the causal link would be to adduce evidence of a properly conducted customer survey which shows that some of the respondent's customers would not buy from a shop where the female staff wear trousers. As long as a fall in sales is established the causal link is made out. However, the actual amount of the fall in sales is relevant to the final element of the justification defence where the tribunal has to balance the benefit to the employer against the detriment to the employee.

An important consequence of the causation test is that it is impossible for employers to justify using different standards for the sexes. Assume that a police force has a rule that in order to train as a dog handler candidates have to be able to run a certain distance in less than a certain time. The rule is that men have to complete the course in under 16 minutes while women have to complete the same course in less than 17

minutes.² The reason for the rule is that dog handlers often have to chase suspected criminals and, therefore, an ability to run fast over a long distance is required. The objective of the police force (catching criminals) is reasonable and it clearly relates to the operation of the business. But does it satisfy the causation test? The answer is almost certainly not, because if a woman who can complete the course in 17 minutes can run fast enough to catch criminals the same must apply to a man who can run at the same speed. Thus, the employer has to set the same time for women and men (and to avoid a claim of indirect sex discrimination the time has to be set at a level that is genuinely necessary to do the job). The same reasoning applies to many other situations where there is one rule for women and one rule for men eg different height requirements. If a woman who has a height of 5ft is tall enough to do a job so too is a man of the same height. The employer will not be able to show that there is a causal link between doing the job and any greater height.

In many cases the reason put forward by the employer will be based on a sex stereotype. For example, an employer refuses to hire men as sewing machinists because employees with nimble fingers are more productive. Implicit in the employer's argument is the stereotype that women have more agile fingers than men. The causation test investigates the accuracy of this stereotype. Can the employer prove that by hiring only women the business will be more productive? This depends on the extent to which the stereotype is accurate. If the stereotype is inaccurate and equal numbers of women and men have the required flexibility to be productive, the employer will fail to satisfy the causation test. On the other hand, if the stereotype is relatively accurate, the employer may be able to show a link between the hiring women and productivity. It is also necessary to take account of the amount of the increase in productivity. The more accurate the stereotype is, the greater will be the increase in productivity. If the stereotype is accurate to the extent that 44% of men and 52% of women have the required flexibility, the employer's policy of hiring only women is likely to have only a small effect on productivity. Thus, when it comes to balancing the benefit to the employer against the detriment to the employees, the employer will not have much to put in the balance. By contrast, if the stereotype is highly accurate, say 20% of men and 90%

² For a case with these facts see *Allcock v Hampshire Constabulary* EOR Discrimination Case Law Digest No 36, p 1.

of women have the requisite flexibility in their fingers, the effect on productivity is likely to be much greater, giving the employer more to put in the balance.

The means test

The means test requires the employer to demonstrate that there is no reasonable and less discriminatory way of achieving the same objective. In some cases this may involve substituting a rule that is directly discriminatory with one that has a disproportionate impact on one sex. For example, an employer may move from differing height requirements for the sexes to the same height requirement. In this situation, the employer must have another look and see if the objective can be achieved in a way that has a neutral impact on the sexes if it is to avoid a finding that the practice is indirectly discriminatory.

The burden is on the employer to demonstrate that there is no other reasonably viable option. If the employer has not even considered the issue, the defence should fail unless it is self evident that no other option exists. Otherwise, the employer should present evidence to the tribunal on all the other options it has considered and the basis on which they were rejected. Furthermore, employers should consider the alternatives when the offending scheme is implemented and not after the event when it is challenged. This does not mean that an ex post facto investigation will never suffice if the employer can show that there were no alternatives when the scheme was instituted and none have arisen in the intervening period.

What factors should the tribunal take into account in determining whether the employer has acted reasonably? In the DDA tribunals are given five factors that they must take into account in determining whether it is reasonable for an employer to make a particular adjustment (s 6(4)). The five factors are:

- a) the extent to which taking the step would prevent the effect in question;
- b) the extent to which it is practicable for the employer to take the step;
- c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities;
- d) the extent of the employer's financial and other resources;
- e) the availability to the employer of financial or other assistance with respect to taking the step.

The first of these five factors could apply to the means test for direct sex discrimination although it would be of somewhat limited impact as in most cases the alternative option would remove completely the direct discrimination. In contrast to cases of disability discrimination, it would not be possible to alleviate the problem in part. The second factor would need be changed so that the issue is not the practicality of the alternative option but the extent to which the alternative option delivers the employer's objective. The third and fourth factors could be adopted with appropriate amendments. The final factor is probably not relevant because, unlike disability, there are no special schemes that provide financial assistance to employers to help them accommodate sex differences. Thus, the factors that the tribunal could take into account in determining the reasonableness of an alternative option would be as follows:

- a) the extent to which the alternative option removes the direct discrimination;
- b) the extent to which the alternative option delivers the employer's objective;
- c) the financial and other costs which would be incurred by the employer in taking the alternative option and the extent to which taking it would disrupt any of his activities;
- d) the extent of the employer's financial and other resources.

One factor that should not be taken into account is the impact on the other employees. If an employer has a rule that only men have to work compulsory overtime the effect of changing that rule may be that both sexes are compelled to work overtime. (This involves a levelling down of benefits but the employer may be able to do this if it can not get enough employees to work overtime on a voluntary basis). It would be inappropriate for the tribunal to take account of the impact on the women employees as this is itself a sex based factor. This is in contrast to the position with indirect sex discrimination where the effect on the other employees is a factor that the tribunal can take into account. For example, an employer has a rule that all employees have to work one night shift a week. Assuming the rule has a disproportionate impact on women, in determining whether the rule is justified, the tribunal might take into account the impact (ie more night shifts) on the other employees of allowing some employees to work only day shifts.

The balance test

The final stage of the justification test involves a balancing exercise between the detriment to the employee and the benefit to the employer. The only way to do this objectively is to attach monetary values to the benefit and detriment. Whenever possible, these monetary values should be based on the actual experience of the employer and the employee. However, in some cases this may not be possible, for example where the EOC complains about an employer's policy of hiring only one sex and no actual or potential candidates for the job can be identified. In such a case the tribunal will have to try and put a figure on the detriment although it may be no more than an educated guess.

How should the tribunal undertake the balancing exercise? In cases of indirect discrimination it is not clear how the balancing exercise actually operates and in particular, whether the detriment to the employee has to outweigh the benefit to the employer. Leaving the whole matter vague has the benefit of giving the tribunal a degree of flexibility. On the other hand, it also means that tribunals can apply a weak version of the test thereby undermining the goal of sex equality. Some guidance on how the balance test should be applied would help to secure a stronger application of the test while at the same time ensuring a degree of consistency and legal certainty. There is no obvious formula for working out the point at which the benefit to the employer outweighs the detriment to the employee in every case. The following three stage analysis is a relatively strong test that leans in favour of the employee while leaving reasonable scope for the employer to justify an otherwise discriminatory practice.

Under the first stage of the balance test, the tribunal determines if the detriment to the employee is greater than the benefit to the employer. If it is, the defence fails and there is no need to consider the remaining two stages of the test. Thus, if the detriment to the employee is £2,000 and the benefit to the employer is £1,000, the employer's justification defence fails. In some cases it will be extremely difficult, if not impossible, for the tribunal to quantify the benefit in monetary terms. For example, the organisers of a women only training scheme under s 47 of the SDA (positive action training schemes) operate a policy of hiring only female trainers in order to create a sympathetic and supportive environment and thereby encourage more potential trainees to take up the

course.³ Even assuming that the employer is able to show how many more trainees have been induced to take up the course on the basis that all the trainers are women, it would be impossible for the tribunal to put a figure on the benefit of those additional trainees taking up the course. In this kind of situation the only option available to the tribunal is to balance the competing interests on an impressionistic basis. To some extent this involves the tribunal in substituting its own value judgements for those of the employer. However, the only other alternative is to abandon the test altogether with the result that a weaker test is applied to organisations with social aims as opposed to financial ones.

The second stage of the test only arises if the situation is reversed and the benefit to the employer is greater than the detriment to the employee. In this case the balance does not automatically come down on the side of the employer. Instead, the tribunal goes on to consider whether the benefit is disproportionately large compared to the detriment. Thus, if the benefit is £100,000 and the detriment is £1,000 the benefit is disproportionately large compared to the detriment. In this situation, the defence would succeed. The fact that the employer does not automatically succeed in its defence if the benefit is larger than the detriment strengthens the test in favour of the employee. On the other hand, the proportionality test works in favour of the employer. The rationale underlying the proportionality test is that it is not reasonable for an employer to spend an excessive amount of money in order to avoid a relatively small detriment to an employee. This raises the question of what is an excessive amount of money? One possibility would be to apply a straightforward mathematical formula, eg if the benefit is more than twice the detriment it is disproportionate. The problem with this particular formula is that it takes no account of the actual size of the amounts involved. While it may be unreasonable to require an employer to spend £70,000 in order to avoid a detriment to the employee of £35,000, it might not be unreasonable for the employer to spend £900 in order to avoid a detriment of £400. In order to take account of the actual amounts involved the formula would have to be much more complicated. To avoid the necessity for complex mathematical equations and in order to preserve a degree of flexibility, it is probably preferable to leave the issue of proportionality to the discretion of the tribunal without any additional guidance.

³ These are the facts of *Moult v Nottinghamshire County Council* EOR Discrimination Case Law Digest No 22, Winter 1994, p 4. The employer failed to establish a genuine occupational qualification defence

Finally, if the benefit is not disproportionately large compared to the detriment, the tribunal considers the third element of the test which is the ability of the employer to accommodate the cost. Thus, if the benefit to the employer is £8,000 and the detriment to the employee is £6,000, the tribunal takes into account the financial resources of the employer in determining whether the practice is justified. The underlying assumption is that the greater the resources of the employer, the more cost it should be able to absorb. Thus, it will generally be more difficult for large employers to justify direct discrimination than small employers. An indication of the ability of an employer to cope with a particular cost would be its employment practices in other areas. Thus, in determining whether an employer can cope with maintaining a woman on full pay during six months of maternity leave, a tribunal may look at how the employer treats other employees absent from work for similar periods of time eg sickness absence or study leave.

The three stage analysis outlined above does not specifically take account of the relative impact of the detriment on the employee. There are three reasons for this. First, the relative impact of a financial detriment on an individual is extremely difficult to quantify and would involve a detailed analysis of an individual's lifestyle and family circumstances including the income of any spouse or partner. Second, taking the relative detriment into account means that the same action by the employer could be lawful for some employees but not others. For example, if the employer refuses to hire five women that refusal might be lawful for some of the five but not the rest. In general, wealthier employees would have less protection than poorer employees. Furthermore, a relative analysis may have a discriminatory impact on married employees on the basis that they are disproportionately likely to be more affluent. Third, the fact that the balance always comes down in favour of the employee if the detriment is greater than the benefit means that the relative impact on the employee is assumed to be greater than the relative impact on the employer until such time as the benefit is larger than the detriment. By contrast, the relative impact on the employer is only taken into account once the benefit is larger than the detriment.

Where more than one employee is affected, the tribunal should look at the total detriment and the total benefit rather than considering each case individually or using

average figures. Because the detriment is likely to be different for each individual, if the tribunal looks at each case separately the result may be that the practice is lawful for some employees and not others. Not only would this be undesirable from the perspective of the employees, but it would also cause problems for an employer trying to implement a general strategy or reorganisation. Using average figures would avoid this problem but it would also create difficulties in the third stage of the analysis. In determining the ability of the employer to accommodate the cost, the total cost needs to be taken into account at the same time. Otherwise, if the cases are considered one at a time, the costs accumulate and at some point they may reach the point where the tribunal takes the view that the employer can no longer accommodate them. In which case the employees whose cases are considered before this point will win and those that are heard after will lose. Thus, in order to ensure consistency, both for the employees and the employer, it is important that the total amounts are considered by the tribunal.

It is not clear if the balance test should apply at all where the offending measure is enshrined in legislation because of the danger of the courts becoming embroiled in political decision. For example, assume that the Government passes a law that gives men with children under 18 a right to two weeks' paid leave per year. (This leave would be in addition to any unpaid leave that both parents are entitled to under the Parental Leave Directive). The aim of the Government in passing this legislation is to encourage fathers to get more involved in childcare. It would be difficult to argue that this is not a legitimate social aim and, therefore, the reason test would be satisfied. The causation test would almost certainly be satisfied as there is generally a causal link between time spent at work and time spent with children. The means test might be more difficult to pass as it could be argued that the same aim could be achieved by giving either (but not both) of the parents paid time off work. However, the Government might argue that in such a situation the tendency would be for the mother and not the father to take the paid leave. Leaving these problems aside, assume that the means test is satisfied. Should the court then go on and apply the balance test? In doing so the court would have to balance the detriment suffered by the women (no two weeks' paid leave from work) against the benefit to the state of fathers being more involved in childcare. It is extremely unlikely that a court could quantify the benefit to the state of an increase in paternal childcare. Even if it could, this is an inherently political decision and it is arguably not the role of

the judiciary to get involved in such matters. Abandoning the balance test for statutory provisions does not mean that the Government is completely free to pass discriminatory legislation as the other three elements of the justification test still apply. Thus, in order to satisfy the court that a discriminatory provision is justified, the Government would have to show that the offending measure does in fact achieve a legitimate social aim and that there is no other less discriminatory means of achieving the same goal.

LITIGATION COSTS

The model set out above could give rise to increased litigation costs in two ways. First, there is a possibility of more cases being brought (or additional issues being added to existing litigation). Second, when litigation does occur, the model defence could give rise to complex evidential issues. In particular, the causation element of the defence may require expert evidence, for example where an employer seeks to establish the accuracy of a stereotype. It is very difficult to predict what these costs might be. However, to the extent that they do arise, they need to be set against any benefits that may accrue as a result of the introduction of the defence.

THE EXAMPLES

Set out below are three examples of how the justification defence would operate in practice. The examples are based on real cases although some factual assumptions are made where the requisite information is lacking in the case report. In each case all four elements of the test are considered even if it is likely that the test would fail at an earlier stage.

Automotive Products Ltd v Peake⁴

In this case the respondent had a factory employing about 4,000 manual staff including some 400 women. The hours of employment were from 7.30 am to 4.30 pm. All of the manual staff stopped work at 4.25 pm at the sound of the first bell. However, while the female employees were allowed to leave the factory at the first bell, the men had to wait

until the second bell sounded at 4.30 pm before they could leave. The rule was explained by the employer as an administrative arrangement in the interests of health and safety so that the women would not be injured in the rush through the gates. The applicant's complaint of direct sex discrimination was rejected on the basis that the difference in treatment did not amount to a detriment to the applicant. Leaving aside the question of detriment, how would the justification defence operate on the facts of this case? The employer's objective appears to satisfy the reason test on the basis that it is genuine and it relates to the operation of the business. It would be difficult to argue that avoiding a crush at the factory gates is not a genuine need on the part of the employer. The causation test might be more problematic. The employer would have to show that having the women leave at the same time as the men would constitute a health and safety hazard. This would be difficult given that there were already 3,600 men all leaving at the same time with apparently no danger to health and safety. Even if the employer is able to satisfy the causation test, the point where the defence is almost certain to fail is the means test. The employer could achieve the same result using non discriminatory means and at no extra cost to the employer. For example, employees could be allowed to leave five minutes early on the basis of eye colour or the ability to leave early could be rotated between groups of workers. Thus the employer could maintain its objective without differentiating between women and men.

Assuming the employer could have passed the means test, what would be the effect of the final element, the balance test? The detriment to the male employees of having to wait an extra five minutes is the equivalent of five minutes' wages. Thus, the tribunal would have to work out the total value of five minutes' wages for all the men in the factory. There were 3,600 male manual workers. Assume that the average wage was £5 per hour or just over 40p for five minutes' work. The total detriment to the men is about £1,440 per day. Balanced against this is the benefit to the employer of avoiding an accident. This is an example of a benefit that is very difficult to quantify. To do so the tribunal would need some idea of what an accident would cost the employer in terms of compensation and possible fines by the Health and Safety Executive and how likely it is that an accident will happen.⁵ If the risk of an accident happening on any particular day

⁴ [1977] IRLR 365, CA.

⁵ There may be other associated costs such as the effect on sales or orders of any bad publicity surrounding

is 5% and the potential cost to the employer is one hundred thousand pounds the total benefit to the employer of avoiding the risk is £5,000. On this scenario the benefit to the employer outweighs the detriment to the employees and, therefore, the tribunal would have to consider whether the benefit is disproportionate to the detriment. If not, tribunal would have to go on to consider whether the employer could accommodate the cost.

James v Eastleigh Borough Council⁶

This is a case on the supply of goods and services under s 29 of the SDA rather than an employment case but it provides a good illustration of the operation of the means test and the balance test. The Council operated a public swimming pool that gave free admission to individuals of statutory pensionable age ie 65 for men and 60 for women. In a key judgment the HL held that the Council's policy was direct rather than indirect discrimination. As a result, the policy was not capable of justification and, therefore, it was unlawful. What would be the impact of the justification defence for direct discrimination on the facts of this case? The reason for the Council's policy was described by the Vice Chancellor in the CA as being "to give benefits to those whose resources would be likely to have been reduced by retirement. The aim was to aid the needy, whether male or female, not to give preference to one sex over the other." As long as the aim of helping those people living on a pension is not extraneous to the function of a local authority the reason test would be satisfied. What about the causation test? The idea that all people over pensionable age are living on a pension is, of course, a stereotype. Not all people over pensionable age are retired and some people retire before this age. However, it is probably a fairly accurate stereotype and it is likely that the Council would be able to produce statistics to this effect. The means test might be more problematic. Is there a better way of determining whether a person is living on a pension other than relying on pensionable age? This issue was addressed by Lord Griffiths in his dissenting judgment in the HL. He took the view that pensionable age was "the only practical criterion to adopt" on the basis that: "It would be quite impossible to interrogate every person as to whether they were or were not living on a pension or to apply some other form of means test before admitting them to the swimming pool".

the accident.

⁶ [1990] ICR 554, HL.

Clearly it would not be *impossible* to interrogate every person who visits the pool as to whether they are living on a pension or not although it might be costly. Another alternative would be to issue some form of identify card to pensioners who have confirmed in writing that they are living on a pension or who have provided the necessary documentary evidence of their pensionable status. What is the result of applying the four means test factors set out above to the identity card option? First, granting free admission only to those who are actually living on a pension would remove any traces of direct discrimination (although there might still be a problem with indirect discrimination). Second, it would meet the Council's objective of assisting those living on reduced incomes by reason of retirement. Third, the scheme would be more costly than just asking people their age although the costs associated with issuing pensioners with an identity card (it would only have to be done once for each person) are unlikely to be large. Finally, the chances are that any additional costs could be accommodated by the Council relatively easily. Obviously, it all depends on how much the alternative scheme actually costs, but it seems unlikely that the Council could satisfy the means test.

Assuming the Council could persuade the Court that there was no viable alternative, how would the balance test work? The detriment in this case is the cost of admission to the swimming pool (75p at the time) multiplied by the number of visits made by men between the ages of 60 and 64 over a given period. The benefit of the scheme is free admission for all those over pensionable age. This is a rare case where it is possible to put a figure on a social benefit, it is the cost of admittance multiplied by the number of visits by persons of pensionable age over the given period.⁷ Unless for some reason the swimming pool in question is particularly popular with men between the ages of 60 and 64, the benefit is almost certain to outweigh the detriment by a substantial margin. Thus, the benefit would be disproportionate to the loss and the balance test would come down on the side of the Council.

EOC v MRM Distributions plc⁸

The respondent in this case was a distribution and market research company commissioned by Proctor & Gamble to undertake door-to-door interviews in order to

⁷ Arguably, some account should also be taken of men between the ages of 60 and 64 who would have attended the swimming pool but who are deterred by the cost of admission.

ascertain customer preferences for various household items including tampons and sanitary protection products. Research undertaken by the respondent showed that for questions relating to sanitary protection products, men tended to get a refusal rate of 21% and women a refusal rate of 11%. On the basis of this research, the respondent placed requests with the Employment Service for women only door-to-door interviewers. The EOC complained about the advertisements and the respondent tried, unsuccessfully, to defend the case under the genuine occupational qualification defence in s 7 of the SDA.

What would have been the impact of the justification defence in this case? Presumably the reason put forward by the respondent would have been a straight productivity argument: when it comes to door-to-door market research about sanitary products, women are more efficient than men because they illicit a higher response rate. The second stage of the defence is the causation test. Can the employer prove that there is a causal link between sex and productivity. Assuming the research undertaken by the respondent was accurate, this is an example of a relatively accurate sex stereotype. The respondent is able to show that on average, men get a higher refusal rate than women. Thus, in this case the employer would be able to establish a causal link between the offending measure (women only interviewers) and the reason put forward by the employer (increased productivity).

The third element is the means test. Can the employer show that there was no other non-discriminatory means of achieving its objective? Again, the important point here is that the employer is relying on a sex stereotype and the response rates given are only averages. Therefore, some men will be as effective or possibly even more effective than the average woman. The question is whether it is possible for the employer to identify during the recruitment process those men and women who are likely to get high response rates. In other words, is there individuating information available about the prospective employees? No doubt the ability to get women to talk about personal and intimate matters such as their use of sanitary protection products is a skill that is more difficult to measure than other work related skills such as the ability to do simple arithmetic. It is possible that it can be measured in an interview or role play situation. Alternatively, the employer may be able to demonstrate that it is impossible to tell whether a person will get a high response rate until he or she has been trained and sent

⁸ EOR Discrimination Case Law Digest No 25, p 4.

out on some dummy runs. Assume that the most viable alternative option is to use a combination of special interviews and dummy runs. The tribunal then has to apply the four factors relevant to the means test. First, to what extent would the alternative option remove the direct discrimination? In this case the alternative option would remove it completely. Second, to what extent does the alternative option deliver the employer's objective? This would all depend on whether the option is a good predictor of response rates or not. The employer's objective would only be met if the alternative option is a better predictor than the stereotype. Third, the additional financial costs of the option. Obviously, the option is going to be more expensive than the normal recruitment procedure. No doubt, the employer would be able to put a figure on exactly how much more expensive. Finally, there is the extent of the employer's financial and other resources and its ability to accommodate the extra cost. Without more information it is impossible to tell what the outcome of the means test would be but the key factor is likely to be the additional costs of the alternative option.

The final element is the balance test. Does the notional detriment to the employee outweigh the benefit to the employer? The detriment to the employee is a lost job opportunity. In the context of a request for employees placed with the Employment Service and no actual candidates for the job, it is extremely difficult to put a figure on this notional detriment. One rather unsophisticated way to do it would be to use the average length of time that a male with similar qualifications is unemployed in that area. Thus, if the average time spent unemployed is two months and the annual salary is twelve thousand pounds the detriment per job would be two thousand pounds. Balanced against this is the benefit to the employer. The research undertaken by the employer indicates that women tend to get a refusal rate of 11% and men a refusal rate of 21%. This means that in order to get a hundred successful responses the average woman has to knock on 112 doors and the average man on 127 doors. How many extra days or hours of work this adds up to depends on how long it takes to knock on a door and get a refusal and the number of successful responses required. Assume, for the sake of simplicity, that the average man takes a week longer to get the requisite number of successful responses than the average woman. Broadly speaking, the benefit to the employer of the existing policy is the saving of one week's wages. On this scenario, the detriment would outweigh the benefit and the employer's policy of recruiting only female interviewers

would not be justified. However, the figures could easily be reversed with the benefit to the employer outweighing the detriment, particularly if the tribunal reached the view that any potential candidates for the job would be unlikely to be unemployed for any substantial period of time. In which case the tribunal would have to go on and consider whether the benefit is disproportionate to the detriment and, if not, whether the employer could accommodate the cost.

OVERLAP WITH EXISTING LEGISLATIVE EXCEPTIONS

The overlap between the existing legislative exceptions and the proposed justification defence is considered below. In most cases the extent of the overlap is determined by the reason element of the justification defence. If the employer can identify a reason that relates to the operation of the business or organisation there is at least scope for the justification defence to apply. On the other hand, if the rationale underlying the objective is wholly extraneous to the employer's organisation there is no possibility of the defence applying. As a result, the examination of the overlap will concentrate on the first element of the justification defence, namely the reason test.

Genuine occupational qualification

There is a considerable overlap between the justification defence and the genuine occupational qualification exceptions in s 7 of the SDA. The exceptions in s 7 can be grouped under four headings namely artistic licence, decency, social utility and financial considerations (see chapter 4). The first heading, artistic licence, allows producers and directors to discriminate on the ground of sex in casting decisions. Given that the function of the organisation is entertainment, it should not be too difficult for the employer to satisfy the reason test on the basis that a woman/man in a particular role would improve the artistic quality of the production.

Some of the situations covered by the decency exceptions would be covered by the justification defence. For example, an employer would probably be able to establish a business need for employing a female assistant in the fitting room of a lingerie shop. On the other hand, the exception for communal accommodation could be more problematic. An employer can refuse to hire a woman/man on the basis that there is no

separate sleeping accommodation available and it would be unreasonable for the employer to equip the premises with the necessary facilities. Under the justification defence the employer would have to show some genuine need for keeping the accommodation single sex. Unless the employees refuse to work if they have to share a room with someone of the opposite sex, it is difficult to see how the employer benefits from single sex accommodation. Thus, it would be difficult to bring this particular decency exception within the scope of the justification defence.

Most, if not all, of the social utility exceptions could be covered by the justification defence. It would not be difficult for a police force to justify using a male police officer in order to infiltrate a paedophile gang as this is clearly a reason that relates to the operation of the organisation. With personal services, in most cases the employer should be able to identify an operational need. In these cases the problem area is more likely to be the causation test and establishing that one sex is indeed better at the job. All of the financial exceptions are likely to be covered by the justification defence. If anything, the justification defence is likely to go much wider than the financial exceptions in s 7 because it allows employers to use sex appeal in order to increase profits. For example, an employer might be able to justify hiring waitresses rather than waiters if it can show that waitresses sell more drinks.

Positive action

Under domestic law, the positive action exceptions in the SDA are restricted to outreach programmes. Employers are allowed to encourage an under-represented sex to apply for jobs, including the provision of relevant training. The scope of the European positive action exception in article 2(4) of the ETD is less clear but recent case law suggests that reverse discrimination is allowed provided that a number of conditions are met. Neither of these exceptions would be covered by the justification defence. This is because the rationale of these forms of positive action is to improve the position of a currently disadvantaged sex. Thus, under domestic law an engineering company can provide training to female potential engineers in order to increase the number of women in its workforce. Under European law the same employer would be able to prefer a female candidate over an equally qualified male candidate. The result of the exceptions is to increase the number of women engineers in the workforce. However, this result is not

something that benefits the employer. It makes no difference to the operation of the business whether the engineers are female or male (unless for some reason one sex is better at the job in which case sex is a genuine occupational defence and it is not really a case of positive action). As a result, the employer cannot justify the difference in treatment on the basis of a reason that relates to the operation of the business. The rationale for positive action is a wider benefit to the community. On this basis, instances of positive action will never be covered by the justification defence.

It would be possible to expand the justification defence in order to cover cases of positive action. For example, the reason test could be rewritten to incorporate as a potential reason equal representation of the sexes at all levels of the workforce. This would allow an employer to recruit a woman/man for a job solely on the basis that one sex is under represented in that particular role. The problem with expanding the justification defence in this way is that at the balance stage of the defence, the employer would have to weigh the detriment to the applicant (in this case a lost job opportunity) against the benefit to the wider community of equalising the representation of the sexes at all levels of the workforce. Not only is the benefit impossible to quantify in monetary terms, but it is an inherently political decision that is unsuited to the judicial role. The extent to which reverse discrimination is permitted is probably a matter that should be determined by parliament rather than individual judges. On this basis, it will always be necessary to have a separate exception for positive action schemes.

Pregnancy

With pregnancy and maternity it is important to remember that more favourable treatment gives rise to a claim of indirect rather than direct discrimination.⁹ This is because the state of not being pregnant is a distribution characteristic. If an employer decides to give all woman who have a baby an extra week of annual leave, both women and men lose out. This means that even in the absence of any pregnancy and maternity exceptions, more favourable treatment has the potential to be rendered lawful under the justification defence for indirect sex discrimination.

⁹ Although it should be noted that this is not the approach taken by the ECJ which equates more favourable treatment on the grounds of pregnancy or maternity as direct sex discrimination: see the discussion of pregnancy and maternity in chapter 8.

Thus, the potential area of overlap with the model justification defence for direct discrimination is restricted to less favourable treatment. As discussed in chapter 4, the primary rationale for less favourable treatment is health and safety. An employer only has an interest in protecting the health and safety of its employees if it benefits the business in some way, although there will usually be a connection between the two simply because an employee who is ill is also likely to be absent from work. Thus there will be some overlap between the model justification defence and the existing exception for less favourable treatment on the grounds of pregnancy or maternity.

Occupational pension funds

There are two exceptions in the area of occupational pension funds, namely bridging pensions and actuarial factors. The rationale for bridging pension is to compensate male employees for the discrimination in the state pension scheme that arises from the difference in state pensionable age. This is not a rationale that relates to the operation of the employer's business. In fact, bridging pensions are more akin to a form of positive action and so, for the same reasons that are set out above, employers would not be able to justify the payment of bridging pensions. As indicated in chapter 4, the rationale underlying the use of single sex actuarial factors appears to be the risk of market distortion and the impact that that could have on women buying annuity contracts. The risk of market distortion is not a reason that relates to the operation of the employer's business and, therefore, the defence would not apply. This whole issue is covered in more detail in chapter 8.

CONCLUSION

The model justification defence set out in this chapter is a four stage test. First, the employer has to identify a reason for the difference in treatment that relates to the operation of the business (or, if the provision being challenged is enshrined in legislation, the Government must identify a legitimate social aim). Second, the employer must establish that there is a causal link between the discriminatory treatment and the objective of the employer. Thus, the employer must prove that the discriminatory treatment complained of actually has a beneficial impact on the business. Third the

employer has to prove that there is no less discriminatory means of achieving the same objective. In determining whether it would be reasonable for the employer to take an alternative course of action, the tribunal must take into account a specified list of factors. Finally, and assuming the employer is successful on the first three elements of the defence, the tribunal has to balance the benefit to the employer against the detriment to the employee. In order to do this the tribunal must assign monetary values to the benefit and detriment. While the assignation of monetary values may appear to be overly complicated, it is the only way of undertaking an objective balance of these two factors. The balance test consists of three parts. First, the tribunal assesses whether the detriment to the employee outweighs the benefit to the employer. If it does, the applicant wins. If not, the next stage is to determine if the benefit is disproportionately large compared to the detriment. If so, the balance test comes down on the side of the employer. If not, the tribunal considers the ability of the employer to accommodate the additional cost associated with desisting from the discriminatory behaviour. If it is reasonable for the employer to accommodate the cost, the employee succeeds.

In the case of *Birds Eye Walls Ltd v Roberts*¹⁰ the Commission suggested that it might be possible to justify direct discrimination where the aim of the respondent is substantive equality. However, the model defence does not go this far. The fact that the reason must relate to the employer's business means that it does not apply to cases of reverse discrimination. This is because to do so would involve the courts in inherently political decisions. However, it should be noted that it would be possible to extend the model defence so that it covers instances of reverse discrimination by allowing employers to put forward as a reason the aim of substantive equality between the sexes.

One of the main concerns about the model defence is likely to be that it will open the flood gates to direct discrimination by employers. However, as the three examples illustrate, the four stage test is a very difficult hurdle for employers to overcome. It will only succeed where there is a real difference between the sexes that is relevant in the work context and where it is unreasonable for the employer to accommodate the difference. In particular, the model defence is unlikely to permit much gender stereotyping. This is because the only stereotypes that are likely to get through are those where it is not reasonably possible to access individuating information. In the vast

majority of cases it will be relatively easy for an employer to tell whether an individual employee has a particular stereotypical characteristic and, therefore, under the means test, there is likely to be a less discriminatory way for the employer to meet its objective than by relying on a sex stereotype.

Finally, there is some overlap between the application of the model defence and the existing legislative exceptions. The main areas of overlap are likely to be the genuine occupational qualification defence and less favourable treatment for pregnancy and maternity. This is because in both of these areas, the rationale underlying the exception relates to the operation of the employer's business. There is likely to be no or little overlap with the exceptions that apply to occupational pension schemes and the exception for positive action. This is because the rationales underlying these exceptions are extraneous to the operation of the individual employer.

¹⁰ [1994] IRLR 29, ECJ.

JUDICIAL EXCEPTIONS

INTRODUCTION

This chapter looks at some of the problem areas that have arisen in the case law on direct sex discrimination due to the lack of an applicable legislative exception. The four areas considered are pregnancy and maternity, bridging pensions, actuarial factors and dress codes. In each of these areas it is arguable that the courts have used flawed and illogical reasoning in order to avoid a finding of direct sex discrimination thereby creating what can be described as a series of judicial exceptions. In relation to each area the justification defence formulated in chapter 7 is applied to the cases in order to see whether the outcome would have been any different and thus assess further the impact of the model defence.

PREGNANCY AND MATERNITY

The domestic courts initially accepted the argument that the SDA does not cover detrimental treatment on the ground of pregnancy or maternity. In *Turley v. Allders Department Stores Ltd*¹ the EAT held that since it was not possible to make a comparison between a pregnant woman and a man, discrimination against a pregnant woman was not unlawful. However, the EAT chose not to follow that line of argument in the later case of *Hayes v. Malleable Working Men's Club and Institute*.² Instead the EAT held that a pregnant woman could be compared with a sick man off work for a similar period of time. In other words, the circumstances to be compared were the consequences of pregnancy, ie the woman's unavailability for work, rather than the pregnancy itself. The domestic courts were able to use the device of the sick man comparison to ensure a level of protection for pregnant women while at the same time limiting the financial burdens on employers.

¹ [1980] IRLR 4, EAT.

² [1985] IRLR 367, EAT. For a critique of the sick man comparison see: Lacey N, *Dismissal by reason of pregnancy*, (1986) 15 ILJ 43 and Fredman S, *Women and the law*, (1997) p 186.

The whole concept of the sick man comparison was rejected by the ECJ in the case of *Dekker v. Stichting*.³ In a landmark ruling the ECJ held that because pregnancy is a unique sex characteristic, it gives rise to a claim of direct sex discrimination irrespective of the treatment of a sick man. The facts were that the applicant was selected as the most suitable candidate for the post of training instructor. Under Dutch law employees absent from work due to illness or pregnancy are entitled to receive a certain percentage of salary for up to two years. However, the fund which insures employers against this risk is entitled to refuse payment in respect of an employee who becomes unable to work within six months of the cover being taken out if the inability to work was foreseeable at the time at which the cover commenced. The employer was concerned that the applicant's pregnancy would be regarded as a foreseeable event. Without payment from the fund the employer would be unable to recruit a replacement and so the applicant was not appointed. The ECJ held that the employer's decision was contrary to the ETD.

As employment can only be refused because of pregnancy to a woman, such a refusal is direct discrimination on grounds of sex. A refusal to employ because of the financial consequences of absence connected with pregnancy must be deemed to be based principally on the fact of the pregnancy. Such discrimination cannot be justified by the financial detriment in the case of recruitment of a pregnant woman suffered by the employer during her maternity leave.

Three important points come out of the *Dekker* judgment. First, the ECJ held that a refusal to hire on the ground of pregnancy is direct discrimination because pregnancy is a unique sex characteristic. Second, in determining whether the reason for the detrimental treatment is pregnancy you cannot disassociate the consequences of pregnancy, ie the absence from work, from the pregnancy itself. Third, direct discrimination cannot be justified on economic grounds.

What are the logical implications of the *Dekker* judgment? First, a failure to appoint is just one example of the detrimental treatment that can befall a pregnant woman or a woman on maternity leave. There is no logical reason to distinguish a failure to appoint from any other form of detrimental treatment. This means that *all* detrimental treatment on the grounds of pregnancy or maternity should be unlawful

³ [1991] IRLR 27, ECJ. Noted by Ellis E, 'Discrimination on the ground of pregnancy in EEC Law' [1991] PL 159. For an overview of the current state of the law on maternity and pregnancy see: Cox S, 'Maternity and sex discrimination law: where are we now?' EOR No 75, September/October 1997, p 23.

unless it is covered by a statutory exception. Second, according to *Dekker* it is not possible to disassociate pregnancy from its consequences. The consequences of pregnancy include a period of absence from work in the form of maternity leave and, in some cases, a period of sickness absence. Thus, the logical consequences of the *Dekker* judgment are that it would be unlawful to subject a woman to any detriment either on the ground of pregnancy per se or any pregnancy related absence from work. In practical terms this means that it would be unlawful to dismiss or refuse to appoint a woman on the grounds that she is pregnant, on maternity leave or absent from work due to a pregnancy related illness. It would also be unlawful to reduce the pay of a woman on maternity level or to cut her benefits in any way. The ECJ has been willing to follow the logic of *Dekker* to some extent. For example, in the *Thibault*⁴ case the ECJ held that it is unlawful to refuse a woman an annual assessment and, therefore, the opportunity of promotion to a higher grade, because she has been absent from work on maternity leave. However, in other areas the ECJ has departed from its decision in *Dekker* and has created what can arguably be explained as a series of judicial exceptions.

The first judicial exception arises in the context of dismissal on the ground of a pregnancy related illness. If, as the ECJ held in *Dekker*, it is not possible to disassociate pregnancy from its consequences it should be unlawful to dismiss a woman because of a pregnancy related absence whenever it occurs. The ECJ has been willing to accept this argument but only to the extent that the illness occurs between the beginning of the pregnancy and the end of maternity leave. The ECJ has refused to apply the same protection to pregnancy related illness that occurs after the period of maternity leave has ended. The extent of the protection for pregnancy related illness was recently confirmed by the ECJ in the case of *Brown v. Rentokill Ltd.*⁵ The applicant was dismissed after she was absent from work for 26 weeks with a series of pregnancy related illnesses in accordance with the employer's rule that any sickness absence in excess of 26 weeks would result in dismissal. All of the absence took place before the commencement of her maternity leave. The ECJ held that the dismissal was directly discriminatory.

⁴ *Caisse Nationale D'Assurance Vieillesse Des Travailleurs Salaries v Thibault* [1998] IRLR 399, ECJ, Noted by Caracciolo Di Torella E, 'Thibault 'in context': exiting the maze?' (1998) 27 ILJ 373.

⁵ [1998] IRLR 445, ECJ. Noted by Wynn M, 'Pregnancy discrimination: equality, protection or reconciliation?' (1999) 62 MLR 435.

[D]ismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex. (para 24)

In reaching this decision the ECJ did not follow its earlier judgment in *Handels-Og-Kontorfunktionaerernes Forbund v. Dansk handel & Service* (the *Larsson* case)⁶ that pregnancy related illness which occurs during pregnancy can be taken into account in determining whether a woman's absence from work warrants dismissal. (In *Larsson* the applicant was dismissed as a result of her absences both during pregnancy and after her maternity leave.) However, the ECJ chose not to overturn its earlier decision in *Hertz v. Dansk*⁷ that there is no protection for absences that occur after the period of maternity leave has finished. Thus, in *Brown* the ECJ confirmed that:

... where pathological conditions caused by pregnancy or childbirth arise after the end of maternity leave, they are covered by the general rules applicable in the event of illness (see, to that effect, *Hertz*, cited above, paragraphs 16 and 17). In such circumstances, the sole question is whether a female worker's absences, following maternity leave, caused by her incapacity for work brought on by such disorders, are treated in the same way as a male worker's absences, of the same duration, caused by incapacity for work; if they are, there is no discrimination on grounds of sex. (para 26)

It is difficult to identify any logical distinction between a pregnancy related illness that occurs during pregnancy or maternity leave and pregnancy illness that occurs at a later date, particularly in a case where the illness starts in pregnancy and continues after the end of maternity leave. The logical position is that a woman dismissed for a pregnancy related illness is dismissed because of her pregnancy irrespective of when the illness occurs.⁸ The Court was clearly influenced by the difficulties which would be faced by employers if they were unable to dismiss women absent from work with pregnancy related illnesses for extensive periods of time after the end of their maternity leave. In *Hertz* the applicant was absent from work for 100 days over the course of a year. As Advocate General Darmon pointed out in his Opinion, the issue in the *Hertz*

⁶ [1997] IRLR 643, ECJ.

⁷ [1991] IRLR 31, ECJ.

⁸ See Boch C, *Case C-32/93*, (1996) 33 CMLR 545 at 559 and Banforth N, 'The treatment of pregnancy under European Community sex discrimination law' (1995) 1 EPL 59 at 61.

case was "the difficult reconciliation between the principle of equal treatment and the requirements of economic life".⁹

The result of the *Hertz* and *Brown* decisions is that pregnancy related illness that occurs after the end of maternity leave is to be treated the same as any other sickness absence. This means that the level of protection afforded to a woman is dependant on the sickness absence scheme of her particular employer. If the employer is willing to tolerate a high level of sickness absence, the woman will have a high level of protection. On the other hand, if the employer is unwilling to accommodate sickness absence the level of protection will be low.

What would be the position if dismissal on the ground of a pregnancy related illness after maternity leave was treated as direct sex discrimination but there was a justification defence available? First, the employer would have to establish the reason for the dismissal. The reason put forward is likely to be a loss of productivity although the precise form of the lost productivity will depend on the actual job involved. Second, the employer has to satisfy the causation test, ie that the woman's absence actually results in the alleged loss of productivity. No doubt there will be cases where employers can show that the absence of a particular employee has a detrimental effect on the business. However, in other cases it may be possible for the employer to cover the woman's workload with no resulting loss of productivity and no, or only nominal, additional costs. (The only issue here is whether the woman should be dismissed – not whether she should be paid. The latter point would be the subject of a separate application of the justification defence.) Under the third element of the test the employer has to show that there is no other reasonable and less discriminatory means of achieving the same objective. Thus the employer would have to convince the tribunal that the problem of the woman's absence could not reasonably have been dealt with in some way other than dismissal eg a moving the woman to another job where her absence could be more easily covered or offering her a career break. Finally, the tribunal has to balance the detriment to the woman with the benefit to the employer of dismissing her. Assuming the woman is not receiving sick pay her detriment is likely to be her loss of salary from the time she

⁹ Docksey suggests that *Hertz* was simply a bad test case to bring because the period of absence was too long and that it might have been differently decided if the applicant had been dismissed a few days or weeks after the end of her maternity leave period: Docksey C, 'The principle of equality between women

is well enough to return to work until she finds another job and, if the new job is lower paid, she may have a continuing loss of earnings. The benefit to the employer is an increase in productivity. It is possible that having applied all four elements of the test the tribunal finds that the woman's dismissal is indeed justified because the loss of productivity caused by her absence outweighs her loss. However, it is a more difficult test for an employer to satisfy than just showing that the woman was treated in the same way as an other sick employee and it is, therefore, likely to afford pregnant women a higher level of protection.

The second judicial exception concerns the right to sick pay for pregnancy related illness. The extent to which women absent from work for a pregnancy related illness are entitled to sick pay was recently considered by the ECJ in the *Pedersen* case.¹⁰ Under Danish employment law, employees absent from work due to illness are entitled to full pay and the employer is then reimbursed by the state. By contrast, pregnant women absent from work for a pregnancy related illness more than three months before the expected date of confinement were not entitled to any pay from the employer but had a right to pre-maternity benefits paid by the state. The ECJ held that the difference in treatment between pregnancy related illness and other illness was contrary to Article 141 unless the maternity benefits payable were equal to the amount of pay.¹¹

[The] fact that a woman is deprived, before the beginning of her maternity leave, of her full pay when her incapacity for work is the result of a pathological condition connected with the pregnancy must be regarded as treatment based essentially on the pregnancy and thus as discriminatory. (para 35)

However, the ECJ went on to distinguish between absences from work due to a pathological condition or to protect the unborn child and other absences based on routine pregnancy related inconveniences. In the latter case, the ECJ held that there is no obligation on the employer to pay the woman her salary.

[In] contrast to the first three situations outlined by the national court, the pregnant woman is absent from her work before the beginning of her maternity leave not because of a pathological condition or of any special risks for the unborn child giving rise to an incapacity for work attested by a medical certificate but by reason either of routine pregnancy-related inconveniences or of mere

and men as a fundamental right under Community law' (1991) 20 ILJ 258 at 275.

¹⁰ [1999] IRLR 55, ECJ.

¹¹ For a similar but much earlier decision by the domestic courts see: *Coyne v. Exports Credits Guarantee Department* [1981] IRLR 51. The tribunal found that the exclusion of maternity related illness from the employer's sick pay scheme was a breach of the EPA.

medical recommendation, without there being any incapacity for work in either of those two situations.

Consequently, the fact that the employee forfeits some, or even all, of her salary by reason of such absences which are not based on an incapacity for work cannot be regarded as treatment based essentially on the pregnancy but rather as based on the choice made by the employee not to work.

This finding was made by the ECJ in response to a hypothetical situation and, therefore, there is no concrete example of its application or what is meant by “routine pregnancy-related inconveniences”. However, it seems that the question referred by the national court was based on a difference in entitlement to pre-maternity benefits. According to a circular from the Social Affairs Appeal Committee that is set out in the Opinion of the Advocate General, not all pregnancy related illness gives rise to a right to pre-maternity benefits. The circular states that:

In certain situations there is no right to benefit at all. This applies to general inconvenience associated with the normal development of pregnancy, not resulting in incapacity for work, such as nausea, malaise, vomiting, slight anaemia or very slight increase in blood pressure, and to cases where absence from work is based on a doctor’s certificate advising rest on grounds other than a pathological situation in the strict sense or particular risks to the unborn child.

Despite the Court’s comment that these absences are based on a choice by the employee not to work, the circular indicates that the woman’s absence will be supported by a doctor’s certificate advising her not to work. The ECJ appears to be drawing a line between the normal risks of pregnancy such as tiredness and morning sickness and more unusual or severe medical conditions.¹² It is not clear what the basis for this distinction is given that in both cases the woman is unable to work due to illness. Furthermore, it is not clear why the normal risks of pregnancy should be treated any differently from any other kind of ill-health. It may be that it was not the intention of the ECJ to make this distinction and that it only intended to exclude women capable of working who choose to stay at home and who are not certified as sick by a doctor. However, the judgment does appear to go further than this and to the extent that it creates a distinction between women certified as incapable of working because of the normal risk of pregnancy and women with a more unusual or serious medical condition, the ECJ seems to have created

¹² The possibility of distinguishing between the normal risks of pregnancy and other medical conditions was first raised by the Advocate General in the *Hertz* case (see above) in the context of dismissal for a pregnancy related illness although the distinction was not expressly adopted by the Court.

an exception to the general principle that any detrimental treatment on the ground of pregnancy constitutes unlawful direct discrimination.

If the situation is that women absent from work because of a normal pregnancy related illness are not entitled to sick pay, this exception is unlikely to be justified in the vast majority of cases. The employer's reason is clear enough, the cost of paying a woman who is not at work and the causal link is self evident. Also, there is no obvious way of achieving the same result, ie the saving in wages, other than by not paying the woman her salary. In relation to the fourth element of the test the detriment to the woman is the same as the benefit to the employer, in both cases the detriment/benefit is the woman's wages. However, the key point comes in the fifth element of the test and the ability of the employer to pay. By their very nature the normal risks of pregnancy are unlikely to result in long periods of sickness absence. Furthermore, many employers have a sick pay scheme that pays employees absent for at least short periods of time. Thus, most employers will be able to accommodate the cost of paying sick pay to a woman absent from work with a normal pregnancy related illness. There are likely to be only a few cases of very small employers with no sick pay scheme where a refusal to pay will be justified.

The third judicial exception concerns the right of employers to reduce a woman's pay during her period of maternity leave. A period of absence from work is an inevitable consequence of pregnancy and childbirth. How long that period has to be will differ from woman to woman. In some cases it may be only a few days and in other cases it may be several weeks. If a child is fully breast fed the necessary absence from work could be many months. For reasons of certainty and consistency it is preferable to adopt a fixed period rather than having a different period for each mother. Given that 14 weeks is the minimum period of maternity leave allowed to all women regardless of service under the PWD it is sensible to adopt the 14 week period for present purposes although it should be noted that this is an arbitrary figure and the appropriate period is a matter that is open to debate.¹³ Following the logic of *Dekker*, if absence from work is an inevitable consequence of pregnancy, then detrimental treatment on the basis of that absence should

¹³ For a discussion of the problems associated with the ECJ's failure to consider the appropriate period of maternity leave see: Kilpatrick C, 'How long is a piece of string? European regulation of the post-birth period' in Hervey T and O'Keeffe D eds, *Sex equality in the European Union*, chp 6 (1996) at p 94.

be treated as detriment on the grounds of pregnancy itself. On this basis it should be unlawful to reduce a woman's pay because she is absent from work or to stop any other employment rights such as the accrual of holiday pay during the 14 weeks of maternity leave. However, it would not be direct discrimination to subject a woman to a detriment during any extended period of maternity leave over and above the 14 weeks.¹⁴ This is because the extended period of leave is not an inevitable consequence of pregnancy or maternity but represents an additional right given to women under the maternity derogation in article 2(3) of the ETD. Thus, it would not be discriminatory to reduce a woman's pay after the first 14 weeks or stop her right to accrue annual leave.¹⁵

The ECJ refused to follow the logic of *Dekker* when it was asked to give a preliminary ruling on maternity pay in the case of *Gillespie v. Northern Health and Social Services Board*.¹⁶ The NICA asked whether under Article 141, the EPD or the ETD, an employer can reduce a woman's pay during maternity leave. The ECJ held that the benefit paid during maternity leave is pay and therefore falls within the scope of Article 141 and the EPD but not the ETD. Completely contradicting its earlier decisions in *Dekker* and *Webb* the ECJ went on to hold that there is no discrimination under Article 141 because a pregnant woman is not in a position comparable with a man.

It is well-settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, *Finanzamt Köln-Alstadt v. Schumacker*, C-278/93 [1995] ECR I-225, paragraph 30).

The present case is concerned with women taking maternity leave provided for by national legislation. They are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work.

The ECJ did hold that under Article 141 the amount of money paid must not be "so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth." However, the ECJ found that there was nothing to suggest that the amount of benefit granted was inadequate in this case.

¹⁴ In *Boyle v EOC* [1998] IRLR 717, the ECJ confirmed that it is not directly discriminatory to stop the accrual of holiday entitlement during the extended period of maternity leave. See also *Whiting v. Harrow and Hillingdon Health Care NHS Trust* (1995) 26 July, Case No 61664/93/L1-IB, reported in Palmer C, *Maternity Rights*, (1996) p 57.

¹⁵ *Boyle v EOC* [1998] IRLR 717, ECJ.

¹⁶ [1996] IRLR 214, ECJ.

The first criticism that can be made of the ECJ's decision is that the facts of *Schumacker* are not comparable to the facts of *Gillespie*. In *Schumacker* German legislation required that tax payers were treated differently depending on whether they resided within the national territory. The right to have tax assessed at a preferential rate only applied to residents. The ECJ was asked to decide whether the provision was compatible with Article 48 which requires the abolition of discrimination based on nationality between workers of the Member States. The Court noted that the rules were applied on the basis of residency and not nationality and, therefore, any discrimination was indirect. The Court then went on to find that as a general rule, it is not discriminatory to treat residents and non-residents differently because their circumstances are not comparable. Usually, income is concentrated in the place of residence and income received in a country of non-residence is only a part of total income. As a result, it is usually desirable that any preferential tax treatment is applied in the country of residence. However, in the present case the complainant received virtually all of his income in the country of non-residence and virtually no income in his country of residence. On this basis the ECJ held that the difference in treatment was not justified and the complainant should have the right to be assessed for tax on the same basis as a resident. *Schumacker* was a case of indirect discrimination against foreign workers. The similarity in circumstances between the complainant and German nationals meant that the treatment complained of was not justified. It was not a case in which there was no discrimination because of a lack of comparable circumstances. While the ECJ did set out the general principle that discrimination involves the application of different rules to comparable situations, that principle was not applied in the case.

The ECJ was clearly influenced by the provisions of the PWD which only requires employers to pay maternity pay at a level that is comparable with sick pay. As a result, there is no obligation on employers to retain women on maternity leave on full pay. It seems that the ECJ was reluctant to create a right to full pay when Member States had recently decided against this course of action when agreeing the provisions of the PWD.¹⁷

¹⁷ See the comments of McGlynn C, 'Equality, maternity and questions of pay' (1996) 21 ELR 327.

The women in *Gillespie* had a separate claim relating to their level of maternity pay. Maternity pay was calculated on the basis of average weekly pay over a two month period preceding the maternity leave. While the women were on maternity pay there was a backdated pay rise. The employers did not recalculate the amount of the maternity pay to take account of this pay rise. The ECJ held that this did amount to direct discrimination.

The benefit paid during maternity leave is equivalent to a weekly payment calculated on the basis of the average pay received by the workers at the time when she was actually working and which was paid to her week by week, just like any other worker. The principle of non-discrimination therefore requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.

It is difficult to understand the distinction drawn by the ECJ between maternity pay and full pay. In both cases the comparison is between a woman who is on maternity leave and a man who is at work. It is inherently illogical to argue that the circumstances can be comparable in one case but not in the other. The ECJ made much of the fact that maternity pay is calculated on the basis of the wages the woman was receiving before her maternity leave. However, had the ECJ held that women are entitled to full pay during maternity leave the amount of pay would also have been calculated on the basis of earnings prior to maternity leave.

The ECJ has recently used the same lack of comparison argument in the test case of *Doyle v EOC*¹⁸ brought by six employees of the EOC in order to challenge various aspects of their contractual maternity rights. One of the questions referred to the ECJ was whether it is contrary to Article 141 to have a clause in a contract that requires a woman to repay any contractual maternity pay in excess of the statutory minimum if she fails to return to work for more than a month after the end of her maternity leave. This is despite the fact that no similar obligation is placed on workers taking other forms of paid leave such as sick leave. The ECJ held that the term is not contrary to Article 141 because it is not possible to make a comparison between a woman on maternity leave and

¹⁸ [1998] IRLR 717, ECJ.

a person on sick leave. This is an extension to the *Gillespie* decision because if there is no obligation on employers to pay a woman more than the statutory minimum during the period of maternity leave, it must also be the case that if an employer chooses to make additional payments it should be free to attach conditions to the payments.¹⁹

To what extent would employers be able to reduce a woman's pay during the first 14 weeks of maternity pay if the justification defence applied? The reasoning behind not paying a woman on maternity leave is the same as the reasoning behind not paying a woman sick pay: it is simply the cost to the employer of paying someone who is not actually doing any work. Thus, as with sick pay, the first three elements of the test should present no problems for the employer. The detriment to the employer will be the same as the detriment to the employee ie the amount of the woman's wages. Once again, the key factor is likely to be the ability of the employer to pay. In the *Pedersen* case the ECJ held that there would be no discrimination if the benefits paid to a woman absent from work for a pregnancy related illness were the same as her salary. There is no logical reason why maternity leave should be treated any differently from sickness absence and so account can be taken of any benefits paid to the woman during her period of maternity leave such as statutory maternity pay (SMP). Thus, in determining whether the employer has the ability to pay the issue is not whether the employer can pay the full amount of wages but whether the employer can afford to top up the statutory benefits to which the woman is entitled so that taken together she receives the same amount as she would have received had she not been on maternity leave. At the moment, women with 26 week's service immediately preceding the 14th week before the expected week of confinement are entitled to SMP of nine tenths of their salary for the first six weeks followed by a flat rate payment (set at £54 per week from 7 April 1996) for a further 12 weeks.²⁰ Women who do not satisfy the requirements for SMP may be entitled to a maternity allowance which is paid weekly by the benefits agency for a period of 18

¹⁹ The lack of comparison argument was subsequently used by the CA in *Clark v. Secretary of State for Employment* [1996] IRLR 578 although the tribunal declined to follow the lead of the ECJ in *Iverson v. P&O European Ferries (Dover) Ltd* case No.57265/95, IDS Brief 577, p 17.

²⁰ Social Security and Benefits Act 1992, s 165. Small employers can deduct 100% of the gross SMP paid from their national insurance contributions plus an additional 5.5% of the SMP paid. All other employers can recover 92% of the total SMP paid: Statutory Maternity Pay (Compensation of Employers) and Miscellaneous Amendment Regulations 1994, SI no 1882.

weeks.²¹ Thus on a justification defence the question for the tribunal would be whether the employer can afford to top up the statutory benefits to which the woman is entitled for a period of 14 weeks or, if not for the whole 14 weeks, for a lesser period of time. Once again, any contractual sick pay scheme is likely to act as an indication of what the employer can afford. Thus, if an employer is willing to maintain a sick employee on full pay for six months, it would be difficult for the same employer to argue that it could not afford to keep a woman on maternity leave on full pay for 14 weeks. It is difficult to predict how many employers would be obliged to maintain full pay during maternity leave but given that under *Gillespie* women are entitled to no more than the equivalent of statutory sick pay during their maternity leave, the justification defence is likely to result in a significant improvement on the present position.

The possibility of a fourth exception has been raised by the decision of the ECJ in *Webb v Emo Air Cargo (UK) Ltd.*²² The applicant was recruited to cover for another woman's maternity leave although it was anticipated that she would remain employed after the other woman's return to work. Shortly after starting her employment the applicant discovered that she was pregnant and was dismissed. The tribunal, EAT and CA all dismissed the applicant's claim of discrimination under the SDA on the basis that she was dismissed not because of her pregnancy but because of her unavailability for work during her period of maternity leave in circumstances where a man similarly unavailable would also have been dismissed.

The HL referred to the ECJ the question of whether under the ETD it is permissible to dismiss a pregnant woman because of her anticipated unavailability for work where the woman is engaged for an indefinite period. The ECJ reiterated its judgment in *Hertz* that dismissal of a woman on the grounds of pregnancy is direct discrimination. The ECJ went on to find that the:

... dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during

²¹ The payment of maternity allowance is governed by the Social Security (Maternity Allowance) Regulations 1987 SI No 416.

²² [1994] IRLR 482, ECJ. Noted by Fredman S, 'Parenthood and the right to work' (1995) 111 LQR 220; Hare I, 'Pregnancy and sex discrimination' (1991) 20 ILJ 124 and Boch C, 'Case C-32/93' (1996) 33 CMLR 547.

pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity leave is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the Directive.

While reaffirming the general principle that dismissing a woman because of pregnancy is direct discrimination, the reference to women who are recruited for an indefinite period leaves open the possibility that the dismissal of a woman recruited on a definite contract may not be unlawful.²³

The Commission argued that women on definite contracts should not be afforded similar protection to women on indefinite contracts. The basis for the Commission's position was that it would be absurd to require an employer to recruit a woman in circumstances where she would be unavailable for work for the period of the contract. For example, a woman, who is already seven months pregnant, recruited in October to work for two months over the Christmas period. The Commission argued that in such circumstances it should be justified to discriminate against a pregnant woman by refusing to employ her. When the case returned to the HL Lord Keith referred to the ECJ's emphasis on the indefinite nature of the applicant's contract and indicated that it may be possible to distinguish a case where the applicant is unavailable for the whole period of her contract.²⁴

The emphasis placed by the [ECJ] upon the indefinite duration of the applicant's contract of employment suggests the possibility of a distinction between such a case and the case where a woman's absence due to pregnancy would have the consequence of her being unavailable for the whole of the work for which she had been engaged.

The scope of any possible exception was considered by the EAT in *Caruana v Manchester Airport plc.*²⁵ The applicant was employed as an independent contractor on a series of fixed term contracts. The final contract was from 1 January to 31 December 1992. On 11 November 1992 the applicant informed her employer that she would commence her maternity leave on 11 December 1992 and on 3 December the applicant was told that her contract would not be renewed because she would be unavailable for

²³ See the comments of Jacqmain J, in 'Pregnancy as Grounds for Dismissal' (1994) 23 ILJ 355.

²⁴ [1995] 4 All ER 577 at 581. See also Szyszczak E 'Community law on pregnancy and maternity' in Herve T and O'Keeffe D eds, *Sex equality in the European Union*, chp 4 (1996) at p 56.

²⁵ [1996] IRLR 378, EAT.

work at its commencement. The tribunal accepted the evidence of the employer that a man absent in similar circumstances would have been treated the same way.

Applying the decision of the HL in *Webb* before the reference to the ECJ, the tribunal held that the contract was not renewed because of the consequence of the applicant's pregnancy namely that she would be unavailable for work at the critical period. Since a man similarly unavailable for work would be treated the same, the tribunal found that there was no discrimination. On appeal, the EAT applied the decision of the HL in *Webb* after the reference to the ECJ. The EAT held that where the reason for a woman's unavailability for work is pregnancy her subsequent dismissal is on the ground of her sex. The EAT refused to accept the argument that the decisions of the HL and ECJ in *Webb* do not apply to fixed term contracts. The EAT thought that the reference to indefinite contracts was a mechanism to illustrate the hypothetical situation where a woman would be unavailable for work for the whole of the period for which she was engaged. In any event, the EAT thought that the applicant's circumstances were very different from those of a woman refused one contract. The applicant was already in a continuous employment relationship with the employer and her complaint was that the employer had failed to extend that relationship.

Assume that the EAT was correct in its analysis and that any exception is limited to cases where the woman is unavailable for the whole of the period of her contract.²⁶ What would be the impact of the justification defence on such a scenario? The employer's reason for not employing the woman is likely to be the administrative costs of engaging a woman who is not going to be able to work for the whole period for which she is employed. There is no doubt that hiring a woman does involve some administrative costs and, therefore, the causal link is easily established. The third element of the test is likely to be satisfied as there is no other way of avoiding those costs than by not engaging the woman. On the fourth element of the test, what are the respective detriments and benefits? At this point it is important not to confuse the right to be employed with the right to maternity pay. The question of whether the woman is

²⁶ In practice the exception is more likely to be used as a reason for not recruiting rather than as a basis for dismissal as it is unlikely that the woman's unavailability will be discovered after she is hired: see Szyszczak E, 'Pregnancy Discrimination' (1996) 59 MLR 589 at 591. Furthermore, article 10 of the PWD prevents the dismissal of a pregnant woman although by itself, the PWD only gives a right to claim unfair dismissal and not sex discrimination: see s 99(1)(a) of the ERA 1996.

entitled to maternity pay during her period of employment is subject to a separate justification test along the lines set out above. Thus, the issue of pay must be left out of this particular balancing exercise. Under the PWD a woman retains all of her employment rights other than remuneration during the first 14 weeks of maternity pay.²⁷ Therefore, the financial detriment to the woman is likely to be limited to the loss of these benefits. These could include annual leave entitlement, pension rights, the provision of a company car or other benefits in kind. There is an additional and less tangible loss to the woman which is the possibility that the fixed term contract would have been renewed and she would have secured a further period of employment. The employer, on the other hand, has the administrative costs of employing the woman plus the costs of any benefits to which she is entitled during her period of maternity leave. Unless there is a real prospect of further employment, the benefit to the employer is likely to outweigh the detriment to the employee and, therefore, subject to the final element of the test (the ability of the employer to pay) there would be scope for tribunals to find that the employer's decision not to employ the woman is justified.²⁸

BRIDGING PENSIONS

Since 1940 the state pensionable age in the UK has been 60 for women and 65 for men.²⁹ As both women and men start contributing to the scheme at the age of 16, men are disadvantaged because they have to contribute for longer in order to get a full state pension. In addition, if men carry on working between the ages of 60 and 65 they have to continue making contributions while women do not.³⁰ The Pensions Act 1995 contains a formula for equalising the state pensionable age at 65. The change will start to

²⁷ Article 11(2) of the PWD and s 71 Employment Rights Act 1996.

²⁸ One of the problems with this approach is that a woman may not have decided at the time she applies for the job how much maternity leave she is going to take. Under the provisions of the PWD every woman, irrespective of her length of service, is entitled to 14 weeks maternity leave. However, she is only obliged to take a minimum of two weeks leave at the time of confinement: reg 2 of the Maternity (Compulsory Leave) Regulations 1994 SI 1994/2479.

²⁹ See the Social Security Contributions and Benefits Act 1992, section 122. One reason why the pensionable age for women was lowered was to increase the proportion of cases in which the married couple rate was payable when the husband reached the age of 65, the wife usually being a few years younger than her husband.

³⁰ For a more detailed analysis of the difference in treatment see De Vos D, 'Pensionable Age and Equal Treatment from Charybdis to Scylla' (1994) 23 ILJ 175.

take effect in 2010 and will be fully implemented by 2020. No women who are currently over the age of 44 will be affected. However, for the next 20 or so years the state pensionable age for women and men will continue to differ.

Eliminating the discriminatory treatment in employment benefits linked to the state pensionable age has proved problematic. The ECJ was first faced with the problem in *Burton v British Railways Board*.³¹ British Rail operated a voluntary redundancy scheme which was open to women from the age of 55 and men from the age of 60. Under the terms of the scheme, employees taking voluntary redundancy were entitled to a redundancy allowance and an early retirement pension which was funded entirely by British Rail. Mr Burton applied for voluntary redundancy at the age of 58 but his application was rejected. He could not complain under the EPA because the scheme was discretionary and not contractual. His complaint under the SDA was excluded by virtue of s 6(4) which states that the Act does not apply to provisions in relation to death or retirement. The EAT referred to the ECJ the question of whether Mr Burton's treatment was contrary to Article 141 or the ETD.

The ECJ rejected the Article 141 claim on the basis that the conditions of access to a voluntary redundancy scheme are covered by the ETD and not Article 141. Under article 7 of the Social Security Directive 79/7/EEC member states are permitted to set a different pensionable age for women and men for social security purposes. The ECJ held that a difference in treatment which is tied to permitted discrimination in the state social security scheme cannot be regarded as discrimination within the meaning of the ETD.

The fact that access to voluntary redundancy is available only during the five years preceding the minimum pensionable age fixed by national social security legislation and that age is not the same for men as for women cannot in itself be regarded as discrimination on grounds of sex within the meaning of Article 5 of Directive 76/206.

By contrast, the idea that a difference in treatment can be lawful where it is based on the difference in state pensionable age was rejected by the HL in *James v Eastleigh Borough Council*³² in relation to the SDA. Eastleigh Council waived the 75p admission charge to its swimming pools to persons over pensionable age. The purpose of the Council in applying this criterion was to assist those whose resources had been reduced

³¹ [1982] CMLR 137, ECJ.

³² [1990] IRLR 288, HL.

by retirement. The applicant, a man aged 61, complained that the provision was contrary to s 1(1)(a) and s 29(1) of the SDA. The HL held that because the state pensionable age was itself discriminatory, the adoption of that criterion for any other purpose which resulted in a difference in treatment between women and men would also be directly discriminatory.

In *Barber v Guardian Royal Exchange Assurance Group*³³ the ECJ moved away from its decision in *Burton* and opened the way for employees to challenge discriminatory pension ages in occupational schemes. The facts were that the employer operated an contracted-out occupational pension scheme under which the normal pensionable age was fixed at 57 for women and 62 for men. The employer also operated a severance scheme which provided that in the event of redundancy, women over the age of 50 and men over the age of 55 with ten years' service were entitled to an immediate pension. The ECJ made two significant decisions. First, the age at which a worker becomes entitled to a contracted-out occupational pension scheme is pay within Article 141. Second, it is discriminatory to have different ages for women and men even if the difference is derived from the state scheme. The ECJ held:

... it is sufficient to point out that [Article 141] prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality. Accordingly, it is contrary to [Article 141] to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme.

Having decided that the scheme in *Barber* was unlawful, but mindful of the financial implications the decision would have on contracted-out pension schemes, the ECJ limited the temporal effect of the judgment to benefits payable in respect of periods of service after 17 May 1990.³⁴ The effect of the temporal limitation was to allow discriminatory treatment in relation to periods of service prior to this date with the result that it will take 40 odd years to bring into effect full equality in occupational pension schemes. The ECJ subsequently extended its decision that it is contrary to Article 141 to have different pension ages for women and men to supplementary pension schemes in

³³ [1990] IRLR 240, ECJ.

³⁴ The exact scope of the limitation was clarified in *Ten oever v. Stichting* [1993] IRLR 601, ECJ.

Moroni v Firma Collo GmbH.³⁵ The ECJ applied the same temporal limitation on the effect of the judgment as in *Barber*.

On the face of it, the effect of the ECJ's decisions in *Barber* and *Moroni* was to render unlawful all differences in treatment in contracted-out and supplementary occupational pension schemes that stem from different pensionable ages for women and men. However, in *Birds Eye Walls Ltd v Roberts*³⁶ the ECJ held that such a difference in treatment was permitted under Article 141. The difference in treatment arose out of a bridging pension operated by the employer under which employees forced to retire early due to ill health were paid an additional sum to make up the difference between the pension they actually received (calculated on the basis of the years actually worked) and the pension they would have received had they continued to work until the state retirement age. It was common ground that the bridging pension was pay within the scope of Article 141. From the age of 60 the bridging pension for a woman was reduced by the amount of the state pension. The same reduction was made for a man at the age of 65. Mrs Roberts retired because of ill health at the age of 57. She received an annual pension of £383 and a bridging pension of £919 making a total of £1,302. From the age of 60, Mrs Roberts' bridging pension was reduced by £749, the amount of her state pension.³⁷ Mrs Roberts argued that the reduction in her bridging pension was discriminatory under Article 141. The ECJ held that Mrs Roberts had not been subjected to discriminatory treatment because the difference in state retirement ages put her in an incomparable position with a man between the ages of 60 and 65.

It should be noted that the principle of equal treatment laid down by [Article 141] of the Treaty, like the general principle of non-discrimination which it embodies in a specific form, presupposes that the men and women to whom it applies are in identical situations.

Accordingly, although until the age of 60 the financial position of a woman taking early retirement on the grounds of ill health is comparable to that of a man in the same situation, neither of them as yet entitled to payment of the state pension, that is no longer the case between the ages of 60 and 65 since that is when women, unlike men, start drawing that pension. That difference as regards the objective premise, which necessarily entails that the amount of the

³⁵ [1994] IRLR 130, ECJ.

³⁶ [1994] IRLR 29, ECJ.

³⁷ In fact, Mrs Roberts was not entitled to a state pension because she had elected to pay reduced national insurance contributions at the reduced married women's rate although as a widow she was entitled to an equivalent pension.

bridging pension is not the same for men and women, cannot be considered discriminatory.

Although the finding that the circumstances were not comparable is not directly contrary to the facts of *Barber*, it is inconsistent with the general principle that it is contrary to Article 141 to impose an age condition that differs according to sex. The difference in treatment in *Barber* arose between the ages of 50 and 55 when women made redundant were entitled to an immediate occupational pension while men were only entitled to a deferred occupational pension. Between these ages, applying the analysis of the ECJ in *Roberts*, women and men were in comparable circumstances because neither was entitled to a state pension. By the time their circumstances became incomparable at the age of 60, there was no longer a problem in *Barber* because at that age there was no difference in treatment between women and men under the rules of the scheme. However, the general principle of *Barber* would apply equally to an occupational pension scheme under which women are entitled to a pension at the age of 60 while men have to wait until they are 65. On the basis of both *Barber* and *Moroni* such a scheme would be contrary to Article 141. However, if the analysis of the ECJ in *Roberts* is applied, a man denied a pension at the age of 62 would not be in a comparable position to a woman because she would be entitled to a state pension while he would not. However, it is almost inconceivable that the ECJ would find that such a difference in treatment would be lawful.

In *Roberts* both the respondent and the European Commission argued that it was a case of justified direct discrimination. Advocate General Van Gerven took the view that in exceptional cases direct discrimination based on sex could be justified. He thought the discrimination was justified in this case because one of the purposes of the bridging pension was to eliminate inequality brought about by the state pension scheme. The ECJ was obviously affected by these arguments but was unwilling to deal with the justification issue. Instead, it used the inconsistent and illogical argument that the circumstances were not comparable in order to avoid a finding of discrimination.³⁸ However, the practical effect of the decision is that it created yet another judicial exception to the principle that direct sex discrimination is unlawful.

³⁸ According to Ellis, the fact that the ECJ was willing to make such an artificial distinction in this case indicates its strength of feeling against the idea that direct discrimination can be justified: see Ellis E, 'Gender discrimination law in the European Community' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 2 (1996).

What would have been the impact of the justification defence in this case if it had been applied? The first stage of the justification defence is the reason test. The employer has to put forward a reason for the difference in treatment that relates to the operation of the business. In this case, the reason for the difference in treatment is to compensate men for the discrimination in the state pension scheme. It is difficult to see how this could be a reason that relates to the operation of the employer's business. The difference in treatment is really a form of positive discrimination in favour of men. As explained in chapter 7, positive discrimination will always fall outside the scope of the justification defence precisely because the reason for the treatment does not relate to the employer's business.

Is there any other mechanism by which the ECJ could have found the payment of the bridging pension to be lawful? One possibility would be to adopt the approach of the ECJ in the *Pedersen*³⁹ case that the payment of state benefits can be taken into account in determining whether treatment is detrimental. As indicated in chapter 2, in *Pedersen* the ECJ held that it would not be discriminatory to refuse a pregnant woman sick pay if the amount of benefit to which she is entitled is the same as her pay. In other words, state and occupational benefits can be added together in determining whether the difference in treatment is detrimental. The parallel with bridging pensions is almost identical. The lower pension payment by the scheme is completely compensated for by the payment of the state pension. As far as the applicant is concerned, the overall level of income is the same. Viewed from the perspective of a reasonable employee (the test for detriment under domestic law) it is unlikely that this would be considered a detriment.

The other possibility that could be used in the future is the new Article 141(4) which came into effect on 1 May 1999.

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Clearly, the payment of a bridging pension does not make it easier for an under represented sex to pursue a vocational activity and, therefore, it would not satisfy this particular aspect of the exception. However, it is possible that bridging pensions could

³⁹ [1999] IRLR 55, ECJ.

be regarded as a mechanism for compensating disadvantage. The argument against this interpretation is that the disadvantage being compensated does not arise from the individual's career but from the state pension scheme. It is unlikely that the member states had bridging pensions in mind when they agreed the wording of sub-article (4). However, the exception is quite vaguely worded and it would provide a much better mechanism for reaching the result that bridging pensions are lawful than the current stance of the ECJ that they are not discriminatory.

SINGLE SEX ACTUARIAL FACTORS

In *Neath v. Hugh Steeper Ltd*⁴⁰ and *Coloroll Pension Trustees Ltd v. Russell*⁴¹ the ECJ was asked to decide whether the use of actuarial factors in final salary schemes is contrary to Article 141. The facts of *Neath* were that the respondent operated a contracted-out scheme under which the respondent and the trustee could consent to an employee retiring and taking a reduced pension at any time after the age of 50. Where the respondent and the trustee did not consent, the employee was entitled only to a deferred pension or a transfer payment to another scheme. The amount of the transfer payment was calculated on the basis of the capital cost to the scheme of providing the member with a pension. In calculating the cost to the scheme, account was taken of the fact that on average, women live longer than men. The transfer value for a woman was therefore more than for a man. Furthermore, if Mr Neath opted to take a deferred pension and commuted part of his pension for a lump sum payment, the sum would be less than for a woman because of the use of actuarial factors. Mr Neath complained that the use of actuarial tables was contrary to Article 141. In particular, he argued that it was not justified to use class assumptions in order to calculate individual rights since an individual may not conform to the class assumptions.

The ECJ rejected the claim on the basis that the process by which an employer determines the funding necessary to secure pension payments including the use of sex based actuarial factors is outside the scope of Article 141.

⁴⁰ [1994] All ER 929, ECJ.

⁴¹ [1994] IRLR 586, ECJ.

In the context of a defined-benefit occupational pension scheme such as that in question in the main proceedings, the employer's commitment to his employees concerns the payment, at a given time, of a periodic pension for which the determining criteria are already known at the time when the commitment is made and which constitutes pay within the meaning of [Article 141]. However, that commitment does not necessarily have to do with the funding arrangements chosen to secure the periodic payment of the pension, which thus remains outside the scope of application of [Article 141].

In contributory schemes, funding is provided through the contributions made by the employees and those made by the employers. The contributions made by the employees are an element of their pay since they are deducted directly from an employee's salary, which by definition is pay (see the judgment in *Worringham*). The amount of those contributions must therefore be the same for all employees, male or female, which is indeed the same in the present case. This is not so in the case of the employers' contributions which ensure the adequacy of the funds necessary to cover the cost of the pensions promised, so securing their payment in the future, that being the substance of the employer's commitment.

It follows that unlike periodic payments of pension, inequality of employers' contributions paid under funded defined-benefit schemes, which is due to the use of actuarial factors differing according to sex, is not struck at by [Article 141].

That conclusion necessarily extends to the specific aspects referred to in the questions submitted, namely the conversion of part of the periodic pension into a capital sum and the transfer of pensions rights, the value of which can be determined only by reference to the funding arrangements chosen.

In other words, with a defined benefit scheme employee contributions and the payment of a periodic pension are pay within the scope of Article 141. Employer contributions and the conversion of the periodic pension into a capital sum do not constitute pay.

The use of actuarial factors was also considered by the ECJ in *Coloroll Pension Trustees Ltd v. Russell*⁴² in relation to the reversionary pension payable to a dependant in exchange for the surrender of part of the annual pension and a reduced early retirement pension. The ECJ followed its decision in *Neath* and held that in both these situations differences in the amounts of capital benefits or substitute benefits which arise out of the use of actuarial factors are not contrary to Article 141.

A different analysis was put forward by Advocate General Van Gerven. He concluded that Article 141 does not prohibit the use of sex based actuarial factors in order to assess the financial liabilities of a scheme. However, where the use of actuarial factors results in the payment of a lower level of benefit to one sex, including transfer

⁴² [1994] IRLR 586, ECJ.

payments, capital sums or reduced pensions on early retirement, this results in unequal treatment that is prohibited by Article 141. The Advocate General then went on to argue that while unequal treatment of women and men may be justified in some circumstances, the fact that in general women live longer than men could not justify different treatment in contributions and benefits under occupational pension schemes. The Commission argued that while direct discrimination can be justified in some circumstances, the discrimination that derives from the use of actuarial factors is not justified.

The decisions of the ECJ in *Neath* and *Coloroll* are based on the assumption that the element of a pension which is pay is not the capital fund itself but an employee's entitlement to benefits under the rules of the scheme. The funding arrangements by which the solvency of the fund is maintained are therefore outside of the scope of Article 141. On this basis, the conclusion that employee contributions are pay under Article 141 but employer contributions are not pay is understandable. What is more difficult to accept is the distinction drawn by the ECJ between the payment of a periodic pension and the conversion of that payment to a capital sum. The payment of a periodic pension is only one of the benefits that the members of a pension scheme are entitled to. In certain circumstances, a member is also entitled to a transfer payment. The transfer payment represents the member's entitlement to a periodic pension commuted into a capital sum. It is inherently illogical to argue that the commutation of a benefit from a periodic payment to a capital sum can change the benefit's status as pay under Article 141.⁴³ The result is the creation of a judicial exception for the use of single sex actuarial factors that effectively mirrors the exceptions in the OSSD (see chapter 4).

To what extent would the result have been different if the ECJ had applied the justification defence set out in chapter 7? In looking at this point it is helpful to deal with transfer payments and commutation payments separately from capital sums used to buy annuity contracts. With transfer and commutation payments it is difficult to identify the rationale underlying the use of single sex factors. Assume, for the sake of argument, that they do in fact enhance the efficient operation of the scheme. On this basis the first two elements of the justification would be satisfied. What about the means test? Where an individual commutes part of a periodic pension the member receives a lump sum which

⁴³ For a criticism of this argument see: Hervey T, 'Case note on Neath' (1994) CMLRev 1387 at 1396.

he or she is free to spend. The use of unisex factors would remove any discrimination in these payments. The same would apply with transfer payments as long as the member is transferring to another occupational pension that also uses unisex factors. Thus, the means test would not be satisfied in relation to these two uses of single sex factors and the justification defence would fail at this point.

More problematic is the use of single sex factors in the calculation of lump sum payments for the purchase of annuity contracts. If occupational schemes use unisex sex factors and insurance schemes are allowed to continue using single sex factors the result will be that women are worse off because the same lump sum will give them a lower level of annuity than is paid to men. The only way this can be remedied is by removing the exception for the use of single sex factors by insurance companies in s 45 of the SDA. (This would have to be done at the domestic level as it is outside the scope of Article 141.) Thus, the rationale behind using single sex factors in the calculation of lump sums used by purchase annuity contracts is to protect the position of the female members of the scheme. In other words, the use of single sex factors is a case of positive action intended to equalise the position of the sexes. As with all other cases of positive action it is outside the scope of the justification defence because it is not a reason that relates to the operation of the employer's business. The overall result, therefore, is that it is unlikely that employers or occupational pension schemes could justify the use of single sex actuarial factors.

APPEARANCE AND DRESS CODES

A dilemma that has faced the domestic courts is how to deal with the different dress and appearance conventions that apply to women and men.⁴⁴ While it may have become more acceptable for women to wear trousers, skirts (other than kilts) and make-up on men is still an unusual sight. Some employers attempt to restrict the extent to which their employees can adopt an unconventional appearance. As dress conventions are different for women and men, this necessarily involves different rules for the two.

⁴⁴ For a comparative analysis of dress codes and sex discrimination legislation see: Flynn L, 'Gender equality laws and employers' dress codes' (1995) 24 ILJ 255.

Of course, not all different treatment is unfavourable/detrimental to one sex. For example, imagine that for reasons of administrative convenience an employer issues all employees with a staff number that ends with the letter F for women and the letter M for men. Although this is different treatment it is unlikely to be viewed as unfavourable to one sex. Similarly, if an employer issues identical overalls to men and women save that the men's overalls are blue and the women's overalls are green there would not appear to be any unfavourable treatment. On the other hand, if the men are provided with overalls and the women have to supply their own this would appear to constitute unfavourable treatment for the women. The key issue, therefore, is the test for whether different treatment is less favourable or detrimental treatment for one sex.

As indicated in chapter 2, the domestic courts have adopted an objective test for detriment based on the views of a reasonable worker. The correct test is whether a reasonable worker of the applicant's sex would find the treatment detrimental.⁴⁵ Thus, in determining whether it is discriminatory to prohibit a woman from wearing trousers to work, the question the court should ask itself is whether a reasonable woman would find the treatment detrimental. However, the courts have not followed this approach in cases involving dress and appearance codes. Instead, the courts have looked to see whether the rule in question is equally conventional for women and men. If it is, they have declined to find the treatment less favourable. This approach first emerged in the case of *Schmidt v Austicks Bookshops Ltd.*⁴⁶ The applicant was employed at one of the respondent's book shops. The rules on staff appearance required that when they were in contact with the public, women must wear a skirt. There were also restrictions on male employees eg they were not allowed to wear tee-shirts. Both the tribunal and the EAT rejected the applicant's claim. The EAT found that the most sensible approach was to look at the rules in their entirety rather than consider restrictions on individual garments. The EAT concluded that as long as there were rules in place for women and men that restricted wearing apparel and governed appearance there was no detriment despite the fact that the rules were different for each sex.

⁴⁵ See *Jeremiah v Ministry of Defence* [1979] IRLR 436, CA and the other cases discussed in chapter 2.

⁴⁶ [1977] IRLR 360, EAT.

In *Burrett v West Birmingham Health Authority*⁴⁷ the applicant was a nurse who was required to wear a uniform and a starched linen cap which the EAT found served no practical purpose. The applicant objected to wearing the cap because she found it to be demeaning and that it stereotyped nurses. On refusing to wear the cap she was disciplined and transferred to the operating theatre where no caps were worn. Male nurses were required to wear a different uniform including a white tunic and epaulettes. The EAT accepted the finding of the tribunal (based on *Schmidt*) that there was no less favourable treatment as the requirement to wear a uniform applied equally to women and men. The EAT rejected the applicant's argument that her honestly held belief that the cap was demeaning was sufficient to demonstrate less favourable treatment. However, the EAT failed to consider whether the rule was less favourable on an objective test of a reasonable employee.

The issue was considered by the CA in *Smith v Safeway plc*.⁴⁸ The applicant was employed as an assistant in the delicatessen department of a Safeway's store. He was dismissed after he allowed his hair to grow below shirt-collar length in contravention of Safeway's appearance code. Women were allowed to have long hair as long as it was clipped back. Relying on *Schmidt* the tribunal dismissed the application on the basis that it is not discriminatory to have different provisions in relation to the length of hair for women and men as long as both rules are equally rigorously applied. The Chairman of the EAT agreed with the tribunal that there was no less favourable treatment. However, the lay majority in the EAT reversed the decision and found that the applicant had been discriminated against.

The lay members of this Tribunal have no difficulty in holding that the treatment was less favourable and self-evidently so. The requirements laid down by Safeway for the appearance of meat department and delicatessen staff with respect to hairstyle are capable of being applied to both men and women, in such a way as to take account of convention (and therefore be compatible with *Schmidt*), without placing the restriction they do on hair length for men only.

There is no relevant physiological difference between men and women; and the need to present a conventional appearance at work is already met by the standards laid down as to hairstyle which, in the case of a pony-tail is specifically capable of being treated the same for both men and women.

⁴⁷ [1994] IRLR 7, EAT.

⁴⁸ [1996] IRLR 456, CA.

The CA reversed the decision of the lay majority of the EAT and reinstated the decision of the tribunal. Lord Justice Phillips held that there is no unfavourable treatment where the standard applied to both sexes is one of conventionality.

I can accept that one of the objects of the prohibition of sex discrimination was to relieve the sexes from unequal treatment resulting from conventional attitudes, but I do not believe that this renders discriminatory an appearance code which applies a standard of what is conventional. On the contrary, I am inclined to think that such a code is likely to operate unfavourably with regard to one or other of the sexes unless it applies such a standard. As Mr Elias has pointed out, a code which made identical provisions for men and women, but which resulted in one or other having an unconventional appearance, would have an unfavourable impact on that sex being compelled to appear in an unconventional mode. Can there be any doubt that a code which required all employees to have 18-inch hair, earrings and lipstick would treat men unfavourably by requiring them to adopt an appearance at odds with conventional standards?

Finally, it is worth considering the different approach taken by the High Court in Northern Ireland. In *McConomy v Croft Inns Ltd*⁴⁹ the plaintiff was asked to leave the defendant's bar because he refused to remove two small stud earrings that he was wearing in his left ear. The plaintiff claimed his treatment was discriminatory contrary to the Sex Discrimination (Northern Ireland) Order 1976. Relying on *Schmidt*, the judge at first instance dismissed the complaint. Lord Justice Murray in the High Court upheld the plaintiff's appeal and had no hesitation in finding that the difference in treatment was on the ground of sex and that the treatment was less favourable. Unfortunately, the finding of less favourable treatment was made as a bald assertion with no explanation of the test applied.

At first sight I find it difficult to see how it can be said that if refreshment facilities are provided without question to a woman who is wearing earrings and are refused absolutely to a man who is doing the same thing, that the defendants are not infringing the provisions [on less favourable treatment].

It seems, therefore, that the domestic courts have applied two different tests for determining less favourable treatment. In cases not involving appearance or dress codes the courts have held that the correct approach is to consider whether a reasonable worker would find the treatment detrimental. It is not necessary to show that it is a majority opinion or that it has a degree of consensus attached to it. All that is necessary is that the opinion is reasonable. When it comes to dress and appearance codes the courts have held

⁴⁹ [1992] IRLR 561, HC.

that the correct approach is to consider whether the rules for women and men are equally conventional. A social convention is an agreement on social behaviour that has the implicit consent of the majority of the population.⁵⁰ The net effect is a test for less favourable treatment which requires that the majority of the population should view the treatment as detrimental. Clearly, this is a higher standard than the test of the reasonable worker and it makes it easier for employers to impose sex specific dress codes. The reasonable worker test does not, as Lord Justice Phillips suggested in *Smith*, require identical treatment for men and women. This is because men and women may have different views about what it is reasonable to wear. It may be that a reasonable woman considers it a detriment not to be allowed to wear trousers at work but it is no detriment to a reasonable man for him not to be allowed to wear a skirt to work. Allowing women to adopt some of the dress and appearance styles of men and vice versa will not result in men being forced to grow long hair or wear earrings and lipstick.

If the lower standard of a reasonable worker had been applied in the above cases the decisions might well have been different. The applicant in *Schmidt* was told that she could not wear trousers when she was working in contact with the public. The case was heard in 1977 and it may be that at that time it was less common than it is now for women to wear trousers to work. It is, therefore, difficult to predict the opinion of a reasonable worker. However, it is at least arguable that a reasonable female worker would have found the restriction on wearing trousers a detriment. In *Burrett*, a ballot showed a majority of female nursing staff were against wearing the cap. In addition, a colleague of the applicant gave evidence that she found wearing the cap demeaning. The applicant also had the sympathy of the director of nursing, although the director felt that the rule should be obeyed until it was changed. Thus there was at least some evidence on which the tribunal could have found that the requirement to wear the cap would be considered detrimental by a reasonable worker.

In *Smith* there was no evidence before the tribunal as to the public perception of men with long hair. However, the lay members of the EAT concluded that there was nothing unconventional about a pony-tail on a man. If that is correct, it is certainly arguable that to refuse to allow a man to wear his hair in a pony-tail would be a detriment

⁵⁰ The Oxford English Reference Dictionary, Second Edition, 1996.

in the opinion of a reasonable worker. Finally, there is *McConomy* and the rule that men could not wear earrings in the bar. The judge did not explain the basis on which he found the treatment less favourable. Strangely enough, given that it was the only claim of the four that was successful, it is probably the least likely to have got through the test of a reasonable worker or customer. Although it is not a rare sight these days to see a man wearing earrings, probably no less common than men with long hair, the difference is that earrings can be put on and taken off while hair takes a long time to grow. In *McConomy* the plaintiff demonstrated in the witness box that he could remove his earrings in about 10 seconds and had he done so he could have stayed in the bar. Furthermore, unlike the wearing of trousers (which at least has the argument of comfort in its favour) earrings are purely decorative.

Assume, that in each of the above four cases the difference in treatment was detrimental and, therefore, unlawful unless justified by the employer. How would the justification defence apply to these cases? In *Smith* and *Schmidt* it can be assumed that the reason put forward by the employers for the dress rules would be that women in trousers or men with pony tails would have a deleterious impact on sales. The employers would then have to establish the requisite causal link ie that the offending dress styles do indeed have a negative impact on sales. Probably, the only way the employers could do this would be by undertaking a customer survey. If there is no impact on sales the defence fails. On the other hand, if the employer can demonstrate any level of impact the potential drop in sales needs to be weighed against the detriment to the employees. The detriments of not being allowed to wear trousers or have long hair are difficult to quantify in monetary terms but they are unlikely to be large. Depending on how big the impact on sales is the benefit to the employer may or may not be greater than the detriment.

In *Burrett* the EAT found that the starched linen cap served no practical purpose. Given this finding the reasons the employer could put forward are limited to aesthetic arguments that are unlikely to result in any benefit to the employer. Thus, the defence is likely to fail at the first stage. The case where the justification defence has the best chance of succeeding is *McConomy*. The judge was sympathetic to the defendant landlord because he accepted that in a bar where trivial causes often result in disorder, a person under the influence of drink might be moved to violence against a man wearing

earrings. On this basis, the defendant is likely to satisfy the reason test and the causation test. Are there any other less discriminatory means of achieving the same result? One solution would be to ban both sexes from wearing earrings. However, not only is this likely to reduce the level of female custom but it would also be difficult to enforce given the large number of women who wear earrings. The balance test is also likely to come down on the side of the employer. As discussed above, if there is any detriment to the individual male it is likely to be small in monetary terms. On the other hand, the benefit to the landlord of avoiding disorder is likely to be substantial both in terms damage to the property and maintaining a level of custom. Thus, the benefit to the employer is likely to be disproportionately large compared to the detriment to the individual male asked to remove his earring.

CONCLUSION

The existing legislative exceptions have not been wide enough to deal with all of the instances of direct sex discrimination that, in the opinion of the courts, should be lawful. As a result, the courts have been forced to engage in a degree of judicial law making and to create a number of additional exceptions. In the process, the ECJ in particular has applied some extremely suspect reasoning that contradicts not only its own previous case law but some of the basic tenets of sex discrimination law.

The introduction of the model justification defence would not remove the need for judicial creativity in all four of the problem areas discussed above. In particular, it would have no impact in those two areas (bridging pensions and actuarial factors) where the underlying rationale of the employer is positive action or the equalisation of the sexes. However, in the other two areas (pregnancy and maternity, and dress codes) the legal uncertainty inherent in the present approach could be removed by the application of the model justification defence.⁵¹ Furthermore, the defence is likely to enhance rather

⁵¹ An alternative means of dealing with the difficult pregnancy and maternity cases is to reclassify them as indirect discrimination. This approach has been suggested by Wintemute in his article 'When is pregnancy discrimination indirect sex discrimination?' (1998) 27 ILJ 23. Essentially his argument is that pregnancy can be separate from its consequences and, therefore, it is possible to differentiate between situations where a woman is treated detrimentally on the grounds of pregnancy per se and situations where the detrimental treatment is caused by the woman's absence from work or some other consequence of her pregnancy. In the former case the treatment is direct discrimination because pregnancy is a unique female

than detract from the level of equality currently experienced. In many of the cases discussed, the justification defence would require employers to do more than they are currently obliged to do. For example, the defence is likely to increase the entitlement of women to maternity pay. It would also make it more difficult for employers to discriminate in relation to dress codes.

The defence would have the added advantage of requiring a proper investigation into the merits of allowing employers to indulge in directly discriminatory behaviour. This would bring out in the open the real issue, which is where the balance should lie between the financial interests of employers and the aim of equality. Instead of hiding behind an illogical finding that no discrimination exists the courts would have to be open about the fact that they are allowing direct discrimination to occur because they consider that the costs of stopping it are too great.

characteristic but in the latter case the treatment is indirect sex discrimination because absence from work and the other consequences of pregnancy are things that can happen to both sexes. Thus, it would only be direct discrimination to dismiss a woman absent from work due to a pregnancy related illness if a man absent for a similar period of time is not dismissed. However, if all employees absent for a similar period are dismissed the issue becomes one of indirect sex discrimination because sickness absence has a disproportionate impact on women. In essence, Wintemute is arguing for the re-introduction of the sick man comparison that was rejected by the ECJ in the case of *Webb v EMO Air Cargo (UK) Ltd* [1994] IRLR 482. The downside to this approach is that the justification defence for indirect sex discrimination is weaker than the model defence for direct discrimination. See also Hare I, 'Pregnancy and sex discrimination' (1991) 20 ILJ 124 at 129.

EVALUATION

INTRODUCTION

The idea of a justification defence for cases of direct sex discrimination has generated a considerable amount of adverse comment from academic writers. The purpose of this chapter is to consider whether that adverse comment is warranted by evaluating the impact of the model justification defence set out in chapter 7.

NOT A NOVEL CONCEPT

It is worth making the point that the idea of justifying direct discrimination is not a novel concept in employment law. First, under domestic law, it is already possible to justify direct disability discrimination.¹ Although the absence of any categorical disability differences means that there is less scope for direct disability discrimination than direct sex discrimination, direct disability discrimination does exist in the form of unique disability differences and disability stereotypes. Detrimental treatment on the ground of a unique disability difference can be justified for a reason that is “material to the circumstances of the particular case and substantial” (s 5(3) of the DDA).² Thus, there is currently an anomaly between the treatment of unique sex differences and unique disability differences as only some of the former but all of the latter are subject to the application of a justification defence.

Second, there are the provisions of the European Directive on Part-Time Work³ that are due to be implemented by January 2001.⁴ The Directive itself is very short and merely enacts a framework agreement made by the European-level social partners in

¹ This is assuming that unique disability differences are treated as giving rise to claims of direct discrimination: see chapter 6.

² The use of the word ‘particular’ implies that it is not possible to justify the use of a disability stereotype.

³ Directive 97/81/EC.

⁴ Section 18 of the Employment Relations Bill 1999 provides for the Secretary of State to make Regulations dealing with the implementation of the Directive and s 19 deals with the issue of a code of practice. At the time of writing no draft Regulations have been published.

June 1997 which is then annexed to the Directive.⁵ The principle of non-discrimination is set out in article 4(1) of the framework agreement.

In respect of employment and conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.

In other words the Directive prohibits direct discrimination on the ground of part-time work but at the same time introduces a general justification defence.⁶ This is not surprising given that there is a considerable overlap between direct discrimination against part-time workers and indirect sex discrimination. Once the new Directive is implemented, a woman dismissed because she works part-time could claim both indirect sex discrimination and direct part-time discrimination. (The advantage of the latter claim is that there is no need to establish disparate impact.) Given that the same action by an employer can lead to two separate causes of action, it would clearly be arbitrary if a justification defence applied in one case but not in the other or if the two justification defences were different.⁷

Third, the European-level social partners have concluded a framework agreement on discrimination against fixed-term contract workers.⁸ Clause 4(1) of the agreement states that:

In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless justified on objective grounds.

Clause 4(4) provides that the same service qualifications shall apply to fixed-term workers and permanent workers “except where different length of service qualifications are justified on objective grounds”. If it is adopted as a directive by the Council of Ministers, the framework agreement will provide yet another example of a situation in which direct discrimination is subject to a general justification defence.

⁵ For an overview of the Directive and the process by which it was concluded see: Jeffrey M, ‘Not really going to work? Of the Directive on part-time work, ‘atypical work’ and attempts to regulate it’ (1998) 27 ILJ 193.

⁶ It is not clear if the Directive also covers indirect discrimination against part-time workers. The use of the words “solely because they work part-time” in article 4(1) implies that distribution characteristics will not be covered but it remains to be seen how the article will be implemented.

⁷ The Directive does not provide any guidance as to when a difference in treatment is justified but in order to maintain consistency the Government is likely to adopt the justification defence for indirect sex discrimination.

⁸ Equal Opportunities Review No 85, May/June 1999, p 43.

BOUNDARIES

The four stages of the model justification defence are set out in detail in chapter 7 and it is not proposed to repeat them here. However, it is worth reiterating the boundaries of the defence in terms of the reason that can be put forward by the employer. The employer has to identify an objective that relates to the operation of the business or organisation. Thus, this is primarily a financial defence for employers to use. The most common reason put forward is likely to be that an employer has to discriminate on the ground of sex because it would be too expensive not to do so. Again, it is worth making the point that this is not a novel concept. The idea that direct discrimination should be allowed on financial grounds already exists in some of the legislative exceptions. For example, financial considerations can give rise to a defence under s 7 of the SDA where the physiological differences between the sexes mean that sex is essential to the nature of the job. Furthermore, financial considerations appear to have slipped into the pregnancy and maternity exception with the decision of the ECJ in the *Pedersen*⁹ case that employers can avoid paying pregnant women sick pay by insisting that they start their maternity leave early.

However, the model defence is not entirely financially based. There is scope for employers to rely on wider social objectives as long as these relate to the function of the operation. Thus, if an employer is a non-profit making organisation it will be able to put forward social utility arguments as a reason for the detrimental treatment of one sex. The example given in chapter 7 is of a rape crisis centre that hires only women counsellors on the basis that women make more effective counsellors for female rape victims. The fact that employers are able to rely on social utility arguments as long as they relate to the function of the organisation means that there is an overlap between the model justification and some aspects of the existing exception for cases where sex is a genuine occupational qualification.

Where the objective of the employer is based on social utility arguments, the final stage of the defence, the balance test, becomes very difficult to apply. It is not possible

⁹ [1999] IRLR 55, ECJ.

for a tribunal to put a monetary value on the benefit to society of social services such as effective rape counselling. This means that it is impossible for a tribunal to undertake an objective assessment of the benefit and detriments of the offending practice. All that the tribunal can do is to balance the competing interests on an impressionistic basis and try and decide whether the benefit to society outweighs the aim of sex equality.

It is precisely because of this problem that the balance stage of the test does not apply where the practice being challenged is enshrined in legislation. It is proposed that where a discriminatory practice is contained in a legislative provision, the Government has to put forward a reason that is a legitimate social aim. The causation test and the means test still apply but the court hearing the case does not go on to balance the detriment and the benefit. Not only is this impossible to do other than on an impressionistic basis, but it would involve the courts in political questions where all they would effectively be doing would be to substitute their own views for those of parliament.

Political considerations are also the main reason for excluding positive action from the scope of the model defence. The aim of positive action is equal representation of the sexes in all areas of the workforce. Thus, an employer who engages in direct discrimination in order to ensure equal representation is engaging in a political action rather than securing a benefit for the business or organisation. The extent to which direct discrimination should be permitted solely in order to secure equal representation of the sexes is a highly contentious point. Directly discriminatory recruitment is allowed under European law as long as certain conditions are satisfied but it is not permitted in the UK – although some forms of outreach programmes (eg training schemes) are lawful. The fact that discriminatory recruitment is not allowed in the UK is indicative of how divided opinions are as to its use. Given this background it seems sensible to exclude any form of positive action from the scope of the model defence. Thus, employers will not be able to use the justification defence as a basis for securing equal representation of the sexes in the workforce.

IMPACT

The main concern of some commentators about the whole concept of a justification defence for direct discrimination is that it will open the floodgates and allow employers almost unlimited scope to discriminate on the ground of sex.¹⁰ Obviously, it is impossible to tell exactly how often employers would rely on the defence. But, it is possible to get a feel for its likely application from the three examples set out in chapter 7 and the cases discussed in chapter 8. Perhaps the first point to make is that the application of the defence to sex stereotypes will be extremely limited. By their very nature, sex stereotypes are generalised assumptions about the sexes that can be more or less accurate. The causation element of the test means that only relatively accurate stereotypes stand a chance of getting through. Even then, under the means test the employer has to satisfy the tribunal that there is no other way of achieving its objective. In the context of stereotypes this means that there must be individuating information reasonably available. While there will be situations where this is the case, they are likely to be few and far between. The number of instances where both the causation and the means tests are satisfied will almost certainly be modest. The prediction of Hepple that the introduction of a justification defence will undermine the conceptual framework necessary to prevent gender-stereotyping is unlikely to be realised.¹¹

Another important consequence of the causation test is that the defence will not apply in cases where the employer applies different standards to the sexes eg differing height requirements. Under the causation test the employer has to prove that the discriminatory treatment results in the stated objective. It is not possible for two different standards to both cause the same effect. One of them must be superfluous. If a job can be done effectively by a woman capable of lifting 30 kilograms it cannot also be the case that the same job needs to be done by a man capable of lifting 50 kilograms. Thirty kilograms is the necessary weight and the other weight fails the causation test.

¹⁰ In the words of Ellis "it involves the danger of permitting a vague and potentially unlimited range of matters to obstruct liability": 'The principle of equality of opportunity irrespective of sex: some reflections on the present state of European Community law and its future development' in Dashwood A and O'Leary S eds, *The principle of equal treatment in EC law*, chp 9 (1997) p 175.

¹¹ Hepple B, 'Can direct discrimination be justified?', EOR No 55, May/June 1994, p 48. See also the quote from this article in chapter 1.

Instances of this type of direct discrimination ie where differing standards are applied to the sexes are outside the scope of the model defence.

In relation to other forms of direct discrimination the model defence is unlikely to cover a substantial number of cases simply because it is an incredibly difficult hurdle for employers to overcome. It is only capable of applying where there is a categorical or unique sex difference that has an impact on an individual's ability to do a particular job. Furthermore, the employer has to show that it has considered all the alternative options and that there is no less discriminatory means of achieving the same objective which it is reasonable to pursue. Finally, the tribunal has to balance the detriment to the individual against the benefit to the employer. The defence has been formulated in such a way that it is only if the benefit is greater than the detriment that the employer has a chance of succeeding. Even then, the tribunal has to go on to consider whether the benefit is disproportionate to the detriment and, if it is not, whether the employer can accommodate the additional cost. All of this amounts to a very narrow defence and, if it is properly applied by the courts, it will not amount to an open invitation to employers to indulge in discriminatory practices.

The only area where the defence is likely to have a substantial impact is pregnancy and maternity. Employers are likely to argue that they are unable to afford full equality of treatment for pregnant women with long term pregnancy related illnesses or women on maternity leave in terms of keeping them on full pay. The extent to which employers will be successful will largely depend on the extent of their financial resources and their ability to accommodate the costs. However, the end result is likely to be that women are better off than they are at the moment given the current case law of the ECJ in this area. Under the justification defence there is at least the prospect of full maternity pay, which is better than the limited entitlement that currently exists.

In assessing the impact of the defence it is also important to take account of the overlap with some of the existing legislative exceptions. The main area of overlap is the genuine occupational qualification defence. As indicated in chapter 4, the genuine occupational qualification defence covers a whole range of situations including artistic licence, decency, social utility and financial considerations. In the area of overlap, the main difference between the two defences is that the model justification defence is more stringent. First, there is no comprehensive causation test that applies to the genuine

occupational qualification exceptions. In other words, it is not always necessary for the employer to demonstrate that the discrimination actually results in the stated objective. In particular, the decency exceptions either require no evidence of causation or only evidence that a lack of decency *might* occur. Second, the means test is very weak. The employer has only to demonstrate that it does not have employees of the requisite sex who could reasonably undertake the duties *without causing undue inconvenience to the employer* (s 7(4)). There is no obligation on the employer to consider whether the duties could be dispensed with altogether or whether there is some other way of solving the problem. This is much weaker than the means test under the model justification defence where the employer has to demonstrate that there is no other viable option for avoiding the discriminatory treatment.

Given that the original purpose of the genuine occupational qualification exception was to deal with all the physical and social sex differences that can be relevant to the performance of any job, it seems likely that the overlap with the model justification defence will be considerable. It is clearly unsatisfactory that the same factual situation can give rise to two separate defences, particularly where one is more stringent than the other. The best solution would probably be to repeal the genuine occupational qualification defence altogether. To the extent that the genuine occupational qualifications are wider than the model defence (eg the exception for communal accommodation) the scope for employers to discriminate on the ground of sex will be narrowed.

One other impact that the model justification defence might have is to strengthen the justification defence for indirect discrimination. The two defences have several elements in common, in particular the means test and the causation test. However, there is a tendency for the courts to apply these elements in a rather weak fashion. For example, in relation to the means test, tribunals tend to be reluctant to interfere with the management of a business particularly if something has been agreed with the trade unions. As regards the causation test, while the ECJ has made it clear that mere generalisations will not suffice, the courts are often inclined to accept the employer's view about the consequences of a particular practice rather than requiring specific proof of a causal link. If these elements are strictly enforced in the context of direct discrimination it may encourage the courts to be more rigorous in their application of

these elements in cases of indirect discrimination. This could lead to a strengthening of the justification defence for indirect discrimination thereby realigning the balance of the defence more on the side of equality.

LEGAL CLARITY

Another factor that needs to be considered in evaluating the model defence is its effect on legal clarity. Not all cases of direct sex discrimination can be described as being of fundamental importance. A woman's ability to wear trousers to work is probably not a fundamental right even if it is serious enough to constitute a detriment. But in many cases of direct discrimination, the potential or actual detriment to the individual is substantial – particularly where it involves the loss of a job. Thus, it is important that the law in this area should be clear, consistent and, as far as possible, comprehensible to a lay person. This is particularly important in an area where there is limited access to legal aid and applicants often have to deal with cases themselves. It is probably fair to say that in some areas at least the law is in a state of confusion. Four of the main problem areas are discussed in chapter 8. Of these four areas the worst offender is unquestionably the case law of the ECJ on pregnancy and maternity. Having decided that pregnancy and maternity should be classified as sex and, therefore, come under the aegis of direct rather than indirect discrimination, the ECJ has been unwilling to live with the consequences. In order to avoid the full financial implications of its decision, the ECJ has created a whole series of judicial exceptions. As a result, the case law in this area is riddled with inconsistencies and is barely intelligible to the expert practitioner, let alone the lay applicant.

Furthermore, the situation is unlikely to improve in the future. Only recently, the ECJ added a further layer of inconsistency in the *Pedersen* case in relation to the right of pregnant women to claim sick pay. It is only a question of time before a case is referred to the ECJ where a pregnant woman applies for a job on a fixed term contract despite the fact that she is going to be absent for all or almost all of the contract period. When this happens the ECJ will be squarely confronted with the justification issue, although given the inventiveness it has displayed in the past, it would not be surprising if the Court finds a means of avoiding the issue.

The introduction of the model justification defence should have the effect of introducing some clarity and consistency into this difficult area. Both employers and employees would be aware that direct discrimination can be defended as long as it falls within the parameters of the defence. It would no longer be necessary for the ECJ to utilise flawed and illogical reasoning in order to reach the same result. Furthermore, it would have the added advantage of bringing the whole issue out into the open. At the moment the fiction is maintained that there is no such defence and, as a result, there is no proper examination of the merits of the case. In particular, there is no proper attempt to balance the detriment to the applicant against the benefit to the employer. Under the model justification defence the courts would have to be open about the fact that the applicant's right to equality has been trumped by the financial interests of the employer or some other social goal. As with the introduction of any new defence, the benefit of legal clarity needs to be balanced against any increase in litigation costs that may occur.

A SINGLE JUSTIFICATION DEFENCE FOR DIRECT AND INDIRECT DISCRIMINATION

The main difference between the model justification defence for direct discrimination and the justification defence used in cases of indirect sex discrimination is that under the former defence the employer can put forward a reason based on sex. This is not possible in cases of indirect sex discrimination where the employer has to identify an objective other than sex. The remaining elements of the two defences are essentially the same save that the elements of the model defence tend to be stronger and, therefore, more difficult for employers to satisfy. In particular, the final element of the model defence, the balance test, is formulated so that the benefit to the employer has to outweigh the detriment to the employee. The position with indirect discrimination is much vaguer but it seems that the defence can succeed even where the detriment is greater than the benefit.

It would be possible to amalgamate the two defences into one by making the model defence apply to cases of direct and indirect discrimination. The main reason for doing this would be to simplify the law. The result would be that both forms of discrimination would take the stronger elements of the model defence but it would also

mean that it would be possible for employers to justify instances of indirect discrimination for a reason that relates to sex. At first sight it may appear that this would constitute a significant downgrading of the justification defence for indirect sex discrimination. However, looked at more closely this might not be the result. In cases of indirect discrimination an employer has to defend a practice that has a disproportionate impact on sex. The practice might be the application of a height requirement or a requirement to work full-time. Under the model justification defence the employer would have to put forward a reason for the difference in treatment that relates to the operation of the employer's business. While in theory this reason could relate to sex, in practice, it is difficult to think of any instance in which sex is relevant to the operation of a business. For example, an employer might attempt to justify paying part-time workers a lower hourly rate on the basis that most part-time workers are women. This is clearly a reason that relates to sex but it is not a reason that relates to the operational needs of the business. As a result the defence would fail as would probably any other attempt to use sex in order to justify a practice that has a disproportionate impact on one sex. In practice, applying the model justification defence to cases of indirect sex discrimination would probably have the effect of strengthening rather than weakening the defence.

To clarify matters, amalgamating the two justification defences would not have the effect of removing the distinction between direct and indirect discrimination. Direct and indirect discrimination are separate and distinct entities although the point at which one stops and the other starts may be rather indistinct. This is because the courts have adopted an intermediate position in relation to unique sex differences, with some of them coming under the aegis of direct discrimination and others being covered by indirect discrimination. However, in any particular case, the conduct of the employer is either direct or indirect discrimination. It cannot be both things at the same time. The fact that the same defence might apply to both forms of discrimination would not mean that they cease to be distinct entities, much in the same way that there are two forms of disability discrimination although they are both subject to the same justification defence. Thus, the introduction of a common defence should not undermine the contextual framework of sex discrimination law.

CONCLUSION

Sex discrimination legislation is based upon a weak asymmetrical model of equality. Sex differences are accommodated to an extent but they are not rendered totally costless. Thus, the legislation represents a compromise between complete asymmetrical equality, where all sex differences are rendered costless, and the financial needs of employers operating in a free market economy. The main concern of many commentators about the introduction of a justification defence for cases of direct sex discrimination seems to be the possibility that it would tip the balance of the legislation too far in favour of the employer. It seems that those fears may be unfounded as long as the boundaries of the defence are properly delineated. Far from tipping the balance too far in favour of employers, it is possible that a justification defence for direct discrimination would actually enhance the level of sex equality as well as introducing a degree of clarity and certainty into this complex area of law.

BIBLIOGRAPHY*

Aaron J and Lougy C, *The comparable worth controversy*, (Washington DC: Brookings Institution, 1986)

ACAS, *Job evaluation: an introduction*, undated

Allen R, 'The use of statistics in discrimination law', Unpublished notes from a lecture to the Employment Lawyers Association, 5 July 1995

Allport G, *The nature of prejudice*, (London: Addison-Wesley, 1958)

Anderman S, 'Constitutional law and labour law dimensions of Article 119: the case of justification for indirect discrimination' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 8 (London: Longman, 1996)

Anon, 'Equality in occupational pension schemes: still waiting for Coloroll' (1994) 23 ILJ 155

Archer J and Lloyd B, *Sex and gender*, (Cambridge: Cambridge University Press, 1985)

Arnall A, 'Sex discrimination in occupational pension schemes' (1986) 11 ELR 363

Augoustinos M and Walker I, *Social Cognition: An Intergrated Introduction*, (London: Sage, 1995)

Bacchi C, *Same difference: feminism and sexual difference*, (Allen and Unwin, 1990)

Baker M ed, *Sex differences in human performance*, (Chichester: Wiley, 1987)

Bamforth N, 'Setting the limits of anti-discrimination law: some legal and social concepts' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 5, (London: Longman, 1996)

Bamforth N, 'The treatment of pregnancy under European Community sex discrimination law' (1995) 1 EPL 59

Barnard C, 'Gender and commercial discrimination' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 6, (London: Longman, 1996).

Barnard C and Hepple B, 'Indirect discrimination: interpreting *Seymour-Smith*' (1999) 58 CLJ 399

Bernard N, 'What are the purposes of EC discrimination law?' in Dine and Watt eds, *Discrimination law: concepts, limitations and justifications*, chp 7, (London: Longman, 1996)

* This bibliography only includes those items referred to in the footnotes or text.

- Biernat M, 'The shifting standards model: implications of stereotype accuracy for social judgment' in Lee Y-T, Jussim L and McCauley C eds, *Stereotype accuracy: toward appreciating group differences*, chp 4, (Washington DC: American Psychological Association, 1995).
- Billig M, 'Prejudice, categorisation and particularisation: from a perceptual to a rhetorical approach' (1985) 15 *European Journal of Social Psychology* 79
- Bindman G, 'Proof and evidence of discrimination' in Hepple B and Szyszczak E eds, *Discrimination: the limits of the law*, chp 4, (Mansell: 1992)
- Boch C, *Case C-32/93* (1996) 33 CML Rev 547
- British Psychological Society, *Equal pay for work of equal value: a guide to the non-discriminatory use of job evaluation*, (March 1991)
- Brown R, *Prejudice - Its Social Psychology*, (Oxford: Blackwell, 1995)
- Burton S, 'Comment on "empty ideas": logical positivist analysis of equality and rules' (1982) 91 *Yale LJ* 1135
- Caracciolo Di Torella E, 'Thibault 'in context': exiting the maze?' (1998) 27 *ILJ* 373
- Charpentier L, 'The European Court of Justice and the rhetoric of affirmative action' (1998) 4 *ELJ* 167
- Collins H, *CCT*, 'equal pay and market forces' (1994) 23 *ILJ* 341
- Cornell D, *The imaginary domain, abortion, pornography and sexual harassment*, (New York: London, Routledge, 1995)
- Cox S, 'Maternity and sex discrimination law: where are we now?' *EOR* No 75, September/October 1997, p 23
- Craig V, 'Indirect sex discrimination and statutory conditions' (1992) 60 *Scottish Law Gazette* 14
- CRE, *Positive action and equal opportunity in employment*, (1991)
- Curtin D, 'Occupational pension schemes and Article 119: beyond the fringe?' (1987) 24 CML Rev 215
- Curtin D, 'Scalping the community legislator: occupational pensions and "Barber"' (1990) 27 CML Rev 475
- De Burca G, 'The principle of proportionality and its application in EC Law' (1993) 13 *YBEL* 105
- De Vos D, 'Pensionable Age and Equal Treatment from Charybdis to Scylla' (1994) 23 *ILJ* 175

- Deakin S, 'Equality in pensions law - the limits of Barber' (1994) 53 CLJ 236
- Department for Education and Employment, *A guide to the sex discrimination gender reassignment regulations 1999*, (1999)
- Department of Employment, *Employment and Training for people with disabilities*, (1990)
- Department of Social Security, *A consultation on government measures to tackle discrimination against disabled people*, (1994)
- Dine J and Watt B, 'Sexual harassment: moving away from discrimination' (1995) 58 MLR 343
- Disney R and Szyszczak E, 'Part-time work: reply to Catherine Hakim' (1989) 18 ILJ 223
- Docksey C, 'The principle of equality between women and men as a fundamental right under Community law (1991) 20 ILJ 258
- Doyle B, 'Employment rights, equal opportunities and disabled persons; the ingredients of reform' (1993) 22 ILJ 89
- Doyle B, *Disability discrimination and equal opportunities: a comparative study of the employment rights of disabled persons*, (Mansell, 1995)
- Doyle B, *Disability discrimination: law and practice*, (Bristol: Jordans, 1996)
- Dworkin R, 'Reverse discrimination' in *Taking rights seriously*, chp 9, (London: Duckworth, 1977)
- Dworkin R, *A matter of principle*, (Oxford: Clarendon, 1986)
- Eagly A and Steffen V, 'Gender stereotypes stem from the distribution of women and men into social roles' (1984) 46 Journal of Personality and Social Psychology 735
- Eagly A and Wood W, 'Inferred sex differences in status as a determinant of gender stereotypes about social influence' (1982) 43 Journal of Personality and Social Psychology 915
- Ehrlich H, *The Social Psychology of Prejudice*, (New York, London: Wiley, 1973)
- Ellis E, 'Discrimination on the ground of pregnancy in EEC Law' [1991] PL 159
- Ellis E, 'Gender discrimination law in the European Community' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 2, (1996)
- Ellis E, 'The definition of discrimination in European Community Sex Equality Law' (1994) 19 ELR 563

- Ellis E, 'The principle of equality of opportunity irrespective of sex: some reflections on the present state of European Community law and its future development' in Dashwood A and O'Leary S eds, *The principle of equal treatment in EC law*, chp 9, (London: Sweet and Maxwell, 1997)
- Ellis E, *EC Sex equality law*, (Oxford: Clarendon Press, 1998)
- EOC, *Job evaluation schemes free of sex bias*, undated
- Equal Opportunities Review, 'Discriminatory statutory rights can be challenged under EEC law', No 28, November/December 1989, p 39
- Equal Opportunities Review, 'Sex discrimination (gender reassignment) regulations: an EOR guide', No 85, May/June 1999, p 36
- Equal Opportunities Review, 'Sex equality and occupational pensions - Barber five years on', No 62, 1995, p 15
- Equal Opportunities Review, 'Pin-ups and sexual harassment', No 57, September/October 1994, p 24
- Equality for women*, Cmnd 5724, (1974)
- European Commission Communication COM (96) 88 final
- Fenwick H and Hervey T, 'Sex equality in the single market: new directions for the European Court of Justice' (1995) 32 CML Rev 443
- Fenwick H, 'Indirect discrimination in equal pay claims: backward steps in the European Court of Justice' (1995) 1 EPL 31
- Fenwick H, 'Special protections for women in European Union Law' in Hervey T and O'Keeffe D eds, *Sex equality in the European Union*, chp 5 (Chichester: Wiley, 1996)
- Financial Times, 'Surprise ruling on pensions bias', 23 December 1993
- Flynn L, 'Gender equality laws and employers' dress codes' (1995) 24 ILJ 255
- Fredman S, 'A difference with distinction: pregnancy and parenthood reassessed' (1994) 110 LQR 106
- Fredman S, 'Equal pay and justification' (1994) 23 ILJ 37
- Fredman S, 'European Community discrimination law: a critique' (1992) 21 ILJ 119
- Fredman S, 'Less Equal than others - equality and women's rights', in Gearty C and Tomkins A eds, *Understanding human rights*, chp 9, (London and New York: Mansell, 1996)

- Fredman S, 'Parenthood and the right to work' (1995) 111 LQR 220
- Fredman S, 'The poverty of equality: pensions and the ECJ' (1996) 25 ILJ 91
- Fredman S, *Women and the law*, (Oxford: Clarendon Press, 1997)
- Fullinwider R, *The reverse discrimination controversy* (Totowa NJ: Rowan and Littlefield, 1981)
- Grant M, 'Judgment day', *Pensions World*, November 1994, p 2
- Halpern D, *Sex differences in cognitive abilities*, (Hillsdale NJ: L Erlbaum Associates, 1992)
- Hare I, 'Pregnancy and sex discrimination' (1991) 20 ILJ 124
- Hartley TC, *The foundations of European Community law*, (Oxford: Oxford University Press, 1998)
- Hepple B et al, *Improving equality law: the options*, (Justice, 1997)
- Hepple B, 'Can direct discrimination be justified?', *EOR* No 55, May/June 1994, p 48
- Hepple B, 'Equality and discrimination' in Davies P and Sciarra S eds, *European Community labour law: principles and perspectives*, chp 4 (Oxford: Clarendon Press, 1996)
- Hervey T, 'Case note on Neath' (1994) 31 CML Rev 1387
- Hervey T, 'Justification for indirect sex discrimination in employment: European Community and United Kingdom compared' (1991) 40 ICLQ 807
- Hervey T, 'Small business exclusion in German dismissal law' (1994) 23 ILJ 267
- Hervey T, *Justifications for sex discrimination in employment*, (London: Butterworths, 1993)
- Hoffman C and Hurst N, 'Gender stereotypes: perception or rationalisation?' (1990) 58 Journal of Personality and Social Psychology 197
- Honeyball S and Shaw J, 'Sex, law and the retiring man' (1991) 16 ELR 47
- Hosking's and Escolme et al, *Pension schemes and retirement benefits*, (London: Sweet and Maxwell, 1991)
- Hudson D, 'Some reflections on the implications of the Barber decision' (1992) 17 ELR 163
- Industrial Relations Law Bulletin, 'Sex equality in occupational pensions', No 508, p 2
- Industrial Relations Service, *Pay and gender in Britain*, (EOC, 1991)

- Jacqmain J, 'Pregnancy as Grounds for Dismissal' (1994) 23 ILJ 355
- Jost J and Banaji M, 'The role of stereotyping in system-justification and the production of false consciousness' (1994) 33 British Journal of Social Psychology 1
- Jussim L, Lee Y-T and McCauley C, 'Why study stereotype accuracy and inaccuracy' in Lee Y-T, Jussim L and McCauley C eds, *Stereotype accuracy: toward appreciating group differences*, chp 1, (Washington DC: American Psychological Association, 1995).
- Kentridge J, 'Direct and indirect discrimination after Enderby' [1994] PL 198
- Khan K, 'Sexual discrimination in insurance' (1986) 137 NLJ 839
- Kilpatrick C, 'How long is a piece of string? European regulation of the post-birth period' in Hervey T and O'Keeffe D eds, *Sex equality in the European Union*, chp 6 (Chichester: Wiley, 1996)
- Lacey N, 'Dismissal by reason of pregnancy' (1986) 15 ILJ 43
- Leader S, 'Proportionality and the justification of discrimination' in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 9, (London: Longman, 1996)
- Littleton C, 'Reconstructing sexual equality' (1987) 75 Cal L Rev 1279
- Locksley A et al, 'Sex stereotypes and social judgement' (1980) 39 Journal of Personality and Social Psychology 821
- Locksley A et al, 'Social stereotypes and judgements of individuals: an instance of the base rate fallacy' (1982) 18 Journal of experimental and social psychology 23
- Loenen T and Veldman A, 'Preferential treatment in the labour market after Kalanke: some comparative aspects' (1996) IJCLL&IR 43
- Loenen T, 'Comparative legal feminist scholarship and the importance of a contextual approach to concepts and strategies: the case of the equality debate' (1995) 3 Feminist Legal Studies 71
- Lustgarten L, 'Problems of proof in employment discrimination cases' (1977) 6 ILJ 212
- MacKinnon C, 'Difference and dominance: on sex discrimination' in *Feminism unmodified: discourses on life and law*, chp 2, (Cambridge Mass: Harvard University Press, 1987)
- MacKinnon C, *Sexual harassment of working women: a case of sex discrimination*, (New Haven, London: Yale University Press, 1979)
- Margulis L and Sagan D, *Origins of sex: Three billion years of genetic recombination*, (New Haven, London: Yale University Press, 1986)

- Matthews P, 'Legal concepts of justifying discrimination', in Dine J and Watt B eds, *Discrimination law: concepts, limitations and justifications*, chp 3, (London: Longman, 1996)
- McCauley C, 'Are stereotypes exaggerated? A sampling of racial, gender, academic, occupational and political stereotypes' in Lee Y-T, Jussim L and McCauley C eds, *Stereotype accuracy: toward appreciating group differences*, chp 9, (Washington DC: American Psychological Association, 1995)
- McColgan A, *Just wages for women*, (Oxford: Clarendon Press, 1997)
- McColgan A, 'Sexual harassment, sex discrimination and unfair dismissal' (1995) 24 ILJ 181
- McCrudden C, 'Rethinking positive action' (1986) 15 ILJ 219
- McGlynn C, 'Equality, maternity and questions of pay' (1996) 21 ELR 327
- Minow M, *Making all the Difference: inclusion, exclusion, and American law* (Ithaca: Cornell University Press, 1990)
- Moneywise*, June 1999, p 98
- Moore S, 'Justice doesn't mean a free lunch: the application of the principle of equal pay to occupational pension schemes' (1995) 20 ELR 159
- More G, 'Seniority pay for part-time workers' (1991) 16 ELR 320
- National Association of Pension Funds, *Parliamentary Bulletin No 17*, October 1994
- National Association of Pension Funds, *Parliamentary Bulletin No 10*, April 1993
- National Association of Pension Funds, *Twentieth Annual Survey of Occupational Pension Schemes*, (1994)
- Nicholson J, *Men and women: how different are they?* (Oxford: Oxford University Press, 1984)
- O'Hare U, 'Positive action before the European Court of Justice' (1996) 2 Webb JCLI
- Oakes P, Haslam S and Turner J, *Stereotyping and Social Reality*, (Oxford: Blackwell, 1994)
- Office of National Statistics, *English Life Tables No 15*, (1997)
- Opinion of the Economic and Social Committee 97/C 30/19
- Palmer C, *Maternity Rights*, (London: LAG, 1996)
- Pannick D, 'When is sex a genuine occupational qualification?' (1984) 4 OJLS 209

- Pensions World, 'Second class citizens?', July 1991
- Pinker S, *How the mind works*, (London: Penguin, 1997)
- Pitt G, 'Can reverse discrimination be justified' in Hepple B and Szyszczak E eds, *Discrimination: the limits of law*, chp 16, (Mansell, 1992)
- Pitt G, 'Madam Butterfly and Miss Saigon: reflections on genuine occupational qualifications' in Dine J and Watt B, eds, *Discrimination law: concepts, limitations and justifications*, chp 15, (London: Longman, 1996)
- Posner R, 'An economic analysis of sex discrimination laws' (1989) 56 University of Chicago Law Review 1311
- Prechal S, 'Case note on Kalanke' (1996) 33 CML Rev 1245
- Precht K, 'Danfoss in the Danish courts' (1992) 21 ILJ 323
- Pronszynski F and Richards W, *Equal opportunities in the labour market: tackling indirect sex discrimination*, (1995) 2 EPL 117
- Rawls J, 'Justice as fairness' in Laslett P and Runciman WC eds, *Philosophy, politics and society*, chp 7, (Oxford: Basil Blackwell, 1972)
- Rawls J, *A theory of justice*, (Oxford: Clarendon Press, 1972)
- Robson C, *Experiment, design and statistics in psychology*, (Harmondsworth: Penguin, 1983)
- Rubery J, *The economics of equal value*, (EOC, 1992)
- Sacks V, 'Tackling Discrimination Positively in Britain' in Hepple B and Szyszczak Eds, *Discrimination: the limits of the law*, chp 19, (Mansell, 1992)
- Schiek D, 'More positive action in community law' (1998) 27 ILJ 155
- Schiek D, 'Positive action in community law' (1996) 25 ILJ 239
- Schiek D, 'Sex equality law after Kalanke and Marschall' (1998) 4 ELJ 148
- Seba I, 'The doctrine of direct effect: a malignant disease of community law' [1995] LIEI 35
- Senden L, 'Positive action in the EU put to the test. A negative score?' (1996) 3 MJ 146
- Seres J, *Pensions: A practical guide*, (London: Longman, 1992)
- Shaw J, 'Positive action for women in Germany: The use of legally binding quota systems' in Hepple B and Szyszczak E eds, *Discrimination: the limits of the law*, chp 20, (Mansell, 1992)

- Shaw J, 'The burden of proof and the legality of supplementary payments in equal pay cases' (1990) 15 ELR 260
- Shrubsall V, 'Protective practices and the Equal Treatment Directive' (1987) 16 ILJ 118
- Szyszczyk E 'Community law on pregnancy and maternity' in Hervey T and O'Keeffe D eds, *Sex equality in the European Union*, chp 4 (Chichester: Wiley, 1996)
- Szyszczyk E, 'Differences in pay for part-time work' (1981) 44 MLR 672
- Szyszczyk E, 'Equality, survivor's benefits and occupational pension schemes' (1988) 51 MLR 355
- Szyszczyk E, 'European Court rulings on discrimination and part-time work and the burden of proof in equal pay claims' (1990) 19 ILJ 114
- Szyszczyk E, 'Positive action after *Kalanke*' (1996) 59 MLR 876
- Szyszczyk E, 'Pregnancy Discrimination' (1996) 59 MLR 589
- Szyszczyk E, 'The status to be accorded to motherhood: case C-32/93' (1995) 58 MLR 860
- The Times, 'Equality could damage pensioners' income', 1 May 1993
- Thomas G, *The new law on disability*, (London: Sweet and Maxwell, 1997)
- Townley P, 'Spare rib, but no pension', Pensions World, December 1994
- Townshend-Smith R, 'Economic defences to equal pay claims' in Hervey T and O'Keeffe D eds, *Sex equality in the European Union*, chp 3, (Chichester: Wiley, 1996)
- Townshend-Smith R, 'Equal pay and the material factor/difference defence' (1987) 16 ILJ 114
- Villiers C and White F, 'Agitating for part-time workers' rights' (1995) 58 MLR 650
- Weston P, 'On "Confusing Ideas": Reply' (1982) 91 Yale LJ 1153
- Weston P, 'The empty idea of equality' (1982) 95 Harvard Law Review 537
- Whiteford E, 'From non-discrimination to equality: pensions and EC law' in Dashwood A and O'Leary S, eds, *The principle of equal treatment in EC law*, chp 12, (London: Sweet and Maxwell, 1997)
- Williams B, 'The idea of equality' in Laslett P and Runciman WC eds, *Philosophy, Politics and society*, chp 6, (Oxford: Basil Blackwell, 1972)

- Wintemute R, 'When is pregnancy discrimination indirect sex discrimination?' (1998) 27 ILJ 23
- Wynn M, 'Pregnancy discrimination: equality, protection or reconciliation?' (1999) 62 MLR 435